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The Eugenics Movement in North Carolina

Alfred L. Brophy

Elizabeth Troutman

THE EUGENICS MOVEMENT IN NORTH CAROLINA*

ALFRED L. BROPHY** & ELIZABETH TROUTMAN***

This Article places North Carolina into the social, political, and legal context of the movement in the United States that resulted in the sterilization of more than thirty thousand people from the 1920s through the 1960s. We sketch the social and political arguments that were mobilized to support sterilization, as well as the jurisprudence that developed alongside these arguments from the 1910s through the 1930s.

State courts were initially slow to accept sterilization until the United States Supreme Court's decision in 1927 in Buck v. Bell*. Following this decision, courts and legislatures around the United States more readily accepted these practices, even as legal scholars expressed reservations about sterilization. For nearly two decades, until the United States' entrance into World War II, sterilization was broadly accepted by courts. But the United States Supreme Court's decision in* Skinner v. Oklahoma *in 1942 began to turn the tide against sterilization, as did unease with a procedure that was reminiscent of practices touted in Nazi Germany. Yet, even after* Skinner v. Oklahoma *and the end of World War II, as the rest of the nation began to abandon sterilization, sterilizations continued in North Carolina.*

The legal basis for allowing sterilization in North Carolina was that procedural safeguards could overcome any concerns about infringement of personal liberty. This same due process, however, ultimately required the state to develop machinery to facilitate sterilization. The Eugenics Board of North Carolina, the state board in charge of reviewing petitions from public

** Judge John J. Parker, Distinguished Professor of Law at the University of North Carolina, Chapel Hill.

*** Associate, Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, Greensboro, North Carolina., J.D., University of North Carolina School of Law; M.P.P., Duke University Sanford School of Public Policy; B.A., Princeton University.

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health officials for sterilization, produced pre-printed forms to hasten the approval of sterilizations. The Eugenics Board routinely granted the vast majority of sterilization petitions and the few sterilization orders that were challenged in court were regularly upheld. While the number of coerced sterilizations is unknown, the practice disproportionately impacted lower income, and later, female and African American, North Carolinians.

Recent legislation in North Carolina provides modest payments to the victims of the state's sterilization program. While payments for this concentrated episode of state infringement on personal liberty should be applauded, the group of recipients may be both under- and over-inclusive, and some victims have problems proving their entitlement to compensation. Nevertheless, the North Carolina legislation provides a model for legislative action in other states. This dark chapter of North Carolina history is critical to the legal community's collective conscious, lest we again allow an administrative apparatus of the state to overshadow and obliterate our most dearly held freedoms.

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INTRODUCTION

In 1943, Harvard Law School Professor Thomas Reed Powell published a lengthy analysis of the constitutionality of compulsory vaccination and sterilization in the *North Carolina Law Review*.[1]

1. *See generally* Thomas R. Powell, *Compulsory Vaccination and Sterilization: Constitutional Aspects*, 21 N.C. L. REV. 253 (1943) (analyzing the constitutionality of compulsory sterilization and vaccination).

Powell offered guidance on constitutionally permissible public health measures from vaccination through sterilization. His article reads very much like the opinion of a legal realist with several references describing the ambiguous state of the law and difficulty in predicting the outcome of subsequent cases. He wrote towards the end of the article, "[i]f all this seems sadly vague and amorphous to those who extract certainties out of test tubes, it can only be answered that of such is the kingdom of jurisprudence."[2]

Powell thought that the twin Supreme Court precedents of *Buck v. Bell*[3] in 1927 and *Skinner v. Oklahoma*[4] in 1942 shined little "light on what they or their successors would do with milder eugenic measures, except to make clear that they would be zealous in insisting upon strong scientific support for the necessity and the efficacy of prophylactic prescriptions and upon adequate procedural safeguards in picking the persons subjected to them."[5] Later Powell observed that *Skinner v. Oklahoma*, which struck down Oklahoma's law permitting sterilization of those convicted of three felonies, would not be a "stumbling block in the way of any sane public health program however much it may intrude on privacy and preclude self-determination."[6]

Powell's article was published while North Carolina was in the midst of a decades-long program of sterilization. Several years later, Duke Law Professor James Bradway—a famous figure in the development of legal aid and clinical education[7]—published a brief article that summarized North Carolina's law regarding involuntary and voluntary sterilization.[8] He included the good news for physicians that they were immune from civil liability for participation in what Bradway termed "involuntary sterilizations" ordered by the Eugenics Board of North Carolina ("Eugenics Board"), "except in the case of

2. *Id.* at 264.

3. 274 U.S. 200 (1927). *See generally* ADAM COHEN, IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK (2016) (documenting the story of Carrie Buck and the Supreme Court's decision in *Buck v. Bell*).

4. 316 U.S. 535 (1942).

5. Powell, *supra* note 1, at 263.

6. *Id.* at 264.

7. *See Guide to the John S. Bradway Papers, 1914–1949*, DUKE U. LIBR. (Apr. 2014), http://library.duke.edu/rubenstein/findingaids/uabradjs/ [https://perma.cc/85ZN-RU3G] (discussing Bradway's importance to legal education).

8. *See generally* John S. Bradway, *The Legality of Human Sterilization in North Carolina*, 11 N.C. MED. J. 250 (1950) (discussing the North Carolina law regarding sterilization procedures).

negligence in the performance of said operation."[9] Both Powell and Bradway lent strong academic support to the eugenics movement. They were part of a sophisticated intellectual defense of a system that drew substantial political support in North Carolina and throughout the United States from the early twentieth century to the post-World War II era.[10]

In North Carolina and nationwide, public knowledge of and anger towards the history of forced and coerced sterilization has grown dramatically since the early 2000s. A number of events in the early 2000s increased public awareness. In recent years, the story of sterilization has been told in growing detail. These stories typically begin by discussing the early twentieth-century cases that successfully challenged sterilization programs[11] and then trace the development of jurisprudence from *Buck v. Bell* in 1927[12] to *Skinner v. Oklahoma* in 1942.[13] They often highlight the persistence of the eugenics movement into the 1970s.[14] Work to address past injustices and support for reparations has increased along with knowledge about sterilization programs. Within North Carolina, historian Johanna Schoen brought new details about the state's program to light.[15] Schoen's research formed the basis for the *Winston-Salem Journal*'s serial coverage beginning around 2002, which highlighted the experience of individual victims of state-sponsored involuntary sterilizations.[16]

9. *Id*. at 250 (quoting Act of April 5, 1933, ch. 224, sec. 16, 1933 N.C. Sess. Laws 345, 35, *repealed by* Act of Apr. 17, 2003, ch. 13, sec. 1, 2003 Sess. Laws 11, 11).

10. *See, e.g.*, PHILLIP A. REILLY, THE SURGICAL SOLUTION: A HISTORY OF INVOLUNTARY STERILIZATION IN THE UNITED STATES 99–100, 137–39 (1991).

11. *See, e.g.*, Stephen Siegel, *Justice Holmes*, Buck v. Bell, *and the History of Equal Protection*, 90 MINN. L. REV. 106, 106–11 (2005).

12. *See* PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND *BUCK V. BELL*, at ix–xiv (2008) (discussing the primary actors and underlying motivations behind *Buck v. Bell* and highlighting the historical implications of the decision).

13. *See* VICTORIA F. NOURSE, IN RECKLESS HANDS: *SKINNER V. OKLAHOMA* AND THE NEAR-TRIUMPH OF AMERICAN EUGENICS 13–16 (2008) (discussing the historical backdrop surrounding *Skinner v. Oklahoma* and the eugenics movement in the United States).

14. *See* JOHANNA SCHOEN, CHOICE & COERCION: BIRTH CONTROL, STERILIZATION, AND ABORTION IN PUBLIC HEALTH AND WELFARE 241–45 (2004); GREGORY MICHAEL DORR, SEGREGATION'S SCIENCE: EUGENICS AND SOCIETY IN VIRGINIA 221–24 (2008).

15. *See generally* SCHOEN *supra* note 14 (documenting the role of the state in promoting sterilization and the eugenics movement in North Carolina).

16. The serial coverage began in December 2002, when the *Winston-Salem Journal* published "Against Their Will." *Against Their Will*, WINSTON-SALEM J. (Dec. 9, 2002), http://www.journalnow.com/specialreports/againsttheirwill/ [https://perma.cc/BKF5-M34Y]; *see also* SCHOEN, *supra* note 14, at 18–19.

These revelations have catalyzed public officials to acknowledge the harm caused by state-sponsored sterilization programs. In May 2002, Virginia Governor Mark Warner apologized for Virginia's role in sterilization;[17] that was shortly followed by an apology by Oregon Governor John Kitzhaber for Oregon's role in sterilization in December 2002.[18] North Carolina Governor Mike Easley issued an apology to victims in December of the same year.[19] These statements were followed by apologies in January 2003 by South Carolina Governor Jim Hodges[20] and in March 2003 by California Governor Gray Davis.[21] The Georgia legislature issued a formal apology in March 2007,[22] and the Indiana State Health Commissioner apologized in April 2007.[23] Similarly, the United Methodist Church apologized in 2008 for its support of eugenics.[24]

In this context of increased public awareness, this Article seeks to trace the history of the eugenics movement within North Carolina. We first analyze the origins of the sterilization mindset of the early twentieth century, locating the push for sterilization in a combination

17. *Virginia Governor Apologizes for Eugenics Law*, USA TODAY (May 2, 2002, 11:15 AM), http://www.usatoday.com/news/nation/2002/05/02/virginia-eugenics.htm [https://perma.cc/GG7K-46CZ].

18. *Apology for Oregon Forced Sterilizations*, L.A. TIMES (Dec. 3, 2002), http://articles.latimes.com/2002/dec/03/nation/na-sterile3 [https://perma.cc/5BZC-6WHK].

19. Governor Easley wrote, "On behalf of the state I deeply apologize to the victims and their families for this past injustice, and for the pain and suffering they had to endure over the years." Kevin Begos, Danielle Deaver & John Railey, *Easley Apologizes to Sterilization Victims*, WINSTON-SALEM J., Dec. 13, 2002, at A1; Jon Elliston, *The state's sterilizations*, INDY WEEK (Dec. 18, 2002), http://www.indyweek.com/indyweek/the-states-sterilizations/Content?oid=1188229 [https://perma.cc/2Z2M-B358]. North Carolina also repealed legislation that permitted the involuntary sterilization of developmentally disabled adults. Act of Apr. 17, 2003, ch. 13, 2003 N.C. Sess. Law 11.

20. Peter Irons, *Forced Sterilization a Stain on California*, L.A. TIMES (Feb. 16, 2003), http://articles.latimes.com/2003/feb/16/opinion/oe-irons16 [https://perma.cc/ST82-2UD9].

21. Carl Ingram, *State Issues Apology for Policy of Sterilization*, L.A. TIMES (Mar. 12, 2003), http://articles.latimes.com/2003/mar/12/local/me-sterile12 [https://perma.cc/6QFL-XVLY]; *see also* Mark G. Bold, Editorial, *It's Time for California to Compensate Its Forced-Sterilization Victims*, L.A. TIMES (Mar. 5, 2015, 8:40 PM), http://www.latimes.com/opinion/op-ed/la-oe-0306-bold-forced-sterilization-compensation-20150306-story.html [https://perma.cc/39BW-J27N] (noting the 2003 apology by Governor Gray Davis).

22. S. Res. 247, 149th Gen. Assemb., Reg. Sess. (Ga. 2007) ("[B]E IT RESOLVED BY THE SENATE that the members of this body express their profound regret for Georgia's participation in the eugenics movement and the injustices done under eugenics laws, including the forced sterilization of Georgia citizens.").

23. Ken Kusmer, *Indiana Apologizes for Role in Eugenics*, WASH. POST (Apr. 13, 2007, 9:49 AM), http://www.washingtonpost.com/wp-dyn/content/article/2007/04/13/AR2007041300259_pf.html [https://perma.cc/ZG3D-Y3QR].

24. UNITED METHODIST CHURCH, RESOLUTION 3184: REPENTANCE FOR SUPPORT OF EUGENICS (2008), *reprinted in* THE BOOK OF RESOLUTIONS OF THE UNITED METHODIST CHURCH 312–18 (2012).

of threads, from concern with government expenditures on social welfare spending to unabashed white supremacy. Initially, the state courts resisted this movement, but as support grew—from the college classroom to the popular press—the balance shifted. Particularly in the wake of decisions in Michigan, Virginia, and the United States Supreme Court, eugenics gained substantial support among courts and legislatures.

This Article explores North Carolina's role in the eugenics movement and the long road to North Carolina's reparations program.[25] Between 1929 and 1974, North Carolina authorized the sterilization of nearly 7,600 people under the state's 1929 sterilization law and subsequent North Carolina Eugenics Board program.[26] North Carolina ranked third nationwide in the number of people sterilized; only California and Virginia sterilized more people.[27] While North Carolina joined this movement and vigorously promoted sterilization, some voices were raised in opposition, particularly in law reviews. Even though the Supreme Court of the United States turned against sterilization in 1942, sterilization in North Carolina continued for decades, even after many other states had abandoned this practice.[28]

While this Article maps the nationwide movement for sterilization, from its beginnings and growth through the increasing opposition and eventual decline, the focus of this Article is North Carolina's role in the movement. Through this lens, North Carolina serves as an example of how legal theory morphed into a comprehensive state program of sterilization. This Article seeks to

25. *See infra* Section VI.A (discussing the North Carolina reparations program).

26. THE GOVERNOR'S TASK FORCE TO DETERMINE THE METHOD OF COMP. FOR VICTIMS OF N.C.'S EUGENICS BD., FINAL REPORT 1, 5 (2012) [hereinafter GOVERNOR'S TASK FORCE, FINAL REPORT], http://www.sterilizationvictims.nc.gov/documents/FinalReport-GovernorsEugenicsCompensationTaskForce.pdf [https://perma.cc/535C-H3FX]. While there are no documented sterilization procedures under North Carolina's first sterilization law of 1919, forty-nine people were sterilized pursuant to the state's 1929 sterilization law prior to the Supreme Court of North Carolina striking it down as unconstitutional in 1933. *Id*. As part of the revised 1933 sterilization law, the general assembly created a five-member Eugenics Board to oversee the state's sterilization program. *Id*.; *see infra* Section V.B. (discussing the 1933 sterilization law and administration of sterilization in North Carolina).

27. Kim Severson, *Thousands Sterilized, a State Weighs Restitution*, N.Y. TIMES (Dec. 9, 2011), http://www.nytimes.com/2011/12/10/us/redress-weighed-for-forced-sterilizations-in-north-carolina.html?pagewanted=all&_r=0 [https://perma.cc/5QYV-V4PD].

28. *See* Kevin Begos, *Lifting the Curtain on a Shameful Era*, WINSTON-SALEM J. (Dec. 9, 2002, 12:00 AM), http://www.journalnow.com/news/local/lifting-the-curtain-on-a-shameful-era/article_fa19404e-8fdf-11e2-8fba-0019bb30f31a.html [https://perma.cc/4LBZ-G9C5] (noting that North Carolina's sterilization program was unique compared to those in other states due to its dramatic expansion after 1945).

understand how North Carolina government actors selected people for sterilization, approved sterilization, and carried out the procedures. There remain unanswered questions as to the circumstances of individual sterilizations in the state.

Despite North Carolina's long history with eugenics—or maybe in part because of it—our state has recently taken the lead in providing compensation for sterilization victims. To conclude, this Article turns to the North Carolina reparations program which has provided for compensation for sterilization victims.[29] Drawing from the North Carolina precedent, we make the case for legislative action to provide reparations in other states. Even if claimants cannot demonstrate that the sterilization was wholly "involuntary," they should still be able to receive relief. Also, this Article suggests limiting factors that counsel in favor of compensation for sterilization victims without opening the door to reparations claims in other settings.

I. THE EUGENICS ERA

A. The Sterilization Mindset: 1910s and 1920s

The idea of state-compelled sterilizations emerged with strength in the 1910s from several lines of thought. A review of the eugenics literature during this period reveals three primary motivations behind what could be termed the "sterilization mindset": first, the search for scientific solutions to human problems; second, the growing population of non-white people in the United States and worldwide posed threats to white supremacy; and third, the belief that sterilization would reduce government expenditures and thus was justified under a cost-benefit analysis. Together, these motivations served as the driving force behind the eugenics movement in the United States.

First, the search for scientific solutions to human problems represents a common theme within eugenics literature. One of the first such works in the United States was published by Harvard University Zoology Professor Charles Davenport, who wrote in the first decade of the twentieth century about eugenics in *The Science of Human Improvement by Better Breeding*.[30] This brief work focused on what traits are inherited and how likely offspring are to inherit a

29. *See infra* Section VI.A (discussing the North Carolina reparations program).

30. C.B. DAVENPORT, EUGENICS: THE SCIENCE OF HUMAN IMPROVEMENT BY BETTER BREEDING (1910).

particular trait.[31] Davenport framed this study as fairly neutral, designed to inform those thinking about marriage and whether their partner would help them have healthy and intelligent children.[32] The upshot of the pamphlet was to warn that mentally disabled parents would likely have mentally disabled children, too.[33] It was a short step from advising potential parents of the likely outcome of a marriage to the more general concern by the state of reproduction and control over the rights of people it deemed undesirable.

The literature during this period built upon the supposed inheritance of mental deficiency, providing a critical justification for the eugenics movement. Henry Goddard's 1912 book *The Kallikak Family: A Study in the Heredity of Feeble-Mindedness* popularized the idea that mental ability and criminal tendencies were inherited traits and that people of low intelligence and those predisposed to crime were more likely to have "feeble-minded" children than those of high intelligence.[34] Goddard's book was followed in 1915 by a study of the Juke family by Arthur Estabrook.[35] Vignettes about families like the Kallikaks and the Jukes were so popular that they were repeated by local officials seeking to support the case for sterilization.[36] In 1918, Paul Popenoe, a eugenics activist educated at Occidental College and later Stanford University, and University of Pittsburgh Professor Roswell Hill Johnson, addressed arguments in favor of eugenics in their textbook *Applied Eugenics*.[37] They built further upon this common narrative of inherited mental deficiency.[38]

In the ensuing years, many adherents approached eugenics not just as a mechanism for human improvement, but also as financially

31. *Id*. at 3–4.

32. *Id*. at 3.

33. *Id.* at 14–16.

34. *See* HENRY HERBERT GODDARD, THE KALLIKAK FAMILY: A STUDY IN THE HEREDITY OF FEEBLE-MINDEDNESS 67–69 (1912).

35. *See generally* ARTHUR HOWARD ESTABROOK, THE JUKES IN 1915 (1916) (documenting the study of the Juke family in New York).

36. *See, e.g.*, N.C. STATE BD. OF CHARITIES AND PUB. WELFARE, BIENNIAL REPORT: DECEMBER 1, 1920 TO JUNE 30, 1922, at 99 (1922) (discussing the "Wake family"). There was, in fact, a small genre of literature that explored the problems across several generations of families. *See, e.g.*, CHARLES B. DAVENPORT & ARTHUR H. ESTABROOK, THE NAM FAMILY: A STUDY IN CACOGENICS 1 (1912); CHARLES B. DAVENPORT & FLORENCE H. DANIELSON, THE HILL FOLK: REPORT ON A RURAL COMMUNITY OF HEREDITARY DEFECTIVES 1 (1912); *see also* MARK H. HALLER, EUGENICS: HEREDITERIAN ATTITUDES IN AMERICAN THOUGHT 108 (1963) (summarizing several family studies).

37. *See* Paul Popenoe, *Preface to the First Edition* of PAUL POPENOE & ROSWELL HILL JOHNSON, APPLIED EUGENICS, at v, vi (1st ed. 1918).

38. *See* POPENOE & JOHNSON, *supra* note 37, at 84–89.

conservative public policy. In 1922, the North Carolina State Board of Public Welfare followed Goddard's model.[39] The Board conducted a study of a family it labeled the "Wake family" (a pseudonym given based on their residence in Wake County, where the state capitol of Raleigh is located).[40] After recounting the origins of the parents and the problems with their five children, the report concluded by arguing that people like the "Wake family" should be prohibited from having children.[41] It was an argument based on utility and economics:

> The tragedy of this story is not so much the drunkenness and immorality this feebleminded family is responsible for, but the sheer waste—the lack of any sort of worth-while contribution to society . . . . Twenty thousand dollars or more has probably been as heedlessly poured out on this family.
>
> Had Joe and Mary been refused a marriage license on the ground of feeblemindedness—as is done in a number of states—and sent to an institution, the State would have been spared much expense and trouble. Had they been rendered incapable of having children they could not have been more diseased than they are, and still society would have been spared a second generation of their kind.[42]

Fifteen years later in 1938, the Eugenics Board again turned to the example of the "Wake family" in a pamphlet to explain the rationale behind eugenics.[43] The Board used the family to demonstrate the

39. *See* N.C. STATE BD. OF CHARITIES AND PUB. WELFARE, *supra* note 36, at 98–99.

40. *Id*. at 99.

41. *Id*. at 102–03.

42. *Id*. *See generally* Anna L. Krome-Lukens, "A Great Blessing to Defective Humanity": Women and the Eugenics Movement in North Carolina, 1910–1940 (2009) (unpublished M.A. thesis, University of North Carolina) (discussing the reform impulse in North Carolina and support for eugenics) (on file with the *North Carolina Law Review*).

43. R. EUGENE BROWN, EUGENICS BD. OF N.C., EUGENICAL STERILIZATION IN NORTH CAROLINA: PURPOSE, STATUTORY PROVISIONS, FORMS, AND PROCEDURE 9–10 (1938) [hereinafter BROWN, PURPOSE, STATUTORY PROVISIONS, FORMS, AND PROCEDURE], http://digital.ncdcr.gov/cdm/compoundobject/collection/p249901coll22/id/417353/rec/3 [https://perma.cc/RL4V-XTKH]. The Eugenics Board published *Eugenical Sterilization in North Carolina* to provide information about basic procedures for sterilization and forms for public health officials to use in petitioning the Board for permission to sterilize individuals. *Id.* at 11–14; *see also* R. EUGENE BROWN, EUGENICS BD. OF N.C., EUGENICAL STERILIZATION IN NORTH CAROLINA: A BRIEF SURVEY OF THE GROWTH OF EUGENICAL STERILIZATION AND A REPORT ON THE WORK OF THE EUGENICS BOARD OF NORTH CAROLINA THROUGH JUNE 30, 1935, at 12–15 (1935) [hereinafter BROWN, A BRIEF SURVEY OF THE GROWTH OF EUGENICAL STERILIZATION], http://digital.ncdcr.gov/cdm/compoundobject/collection/p249901coll22/id/417374/show/417354 [https://perma.cc/L4DV-8LWP].

costs of public welfare and the cost savings of sterilization.[44] This analysis concluded, "[a]t the end of 1922 . . . the family had cost the public at least $20,000 . . . . For the cost of around $100.00 the father and mother of these children could have been sterilized."[45] Such cold economic calculations were central to the case for sterilization.

Popenoe and Johnson's college textbook stated the problem in similarly stark economic terms. The financial burden of caring for "defectives and delinquents . . . is becoming a heavy one; it will become a crushing one . . . . The burden can never be wholly obliterated, but it can be largely reduced by a restriction of the reproduction of those who are themselves socially inadequate."[46] They argued further that restrictions on personal liberty were necessary for the preservation of the race.[47]

Works like Edward Gosney and Paul Popenoe's *Sterilization for Human Betterment* told of the opportunities for harnessing science to improve lives.[48] Gosney and Popenoe's book, published in 1929, after California had already sterilized several thousand people, dealt with the state's experience with eugenics.[49] By minimizing the harms to individuals and by focusing on the cost saved by California taxpayers, they made the case for sterilization more generally.[50] The need for sterilization had oddly resulted from improving standards of medical care, which meant that people, who in previous generations would have died, now lived to have children.[51] The book's thesis is that "[w]e need constructive charity along with our present patchwork variety that tends to increase the burdens of race degeneracy and family suicide."[52] That is, Gosney and Popenoe wanted a policy that was no

44. BROWN, PURPOSE, STATUTORY PROVISIONS, FORMS, AND PROCEDURE, *supra* note 43, at 10.

45. *Id.*

46. POPENOE & JOHNSON, *supra* note 37, at 173.

47. *Id.* at 174.

48. E.S. GOSNEY & PAUL POPENOE, STERILIZATION FOR HUMAN BETTERMENT: A SUMMARY OF THE RESULTS OF 6,000 OPERATIONS IN CALIFORNIA, 1909–1920, at viii (1929). One might note here the shift in book title, from Davenport's subtitle of *The Science of Human Improvement by Better Breeding* to Gosney and Popenoe's *Sterilization for Human Betterment*. Human improvement was key to both books, but in Davenport's 1910 pamphlet the improvement was primarily through voluntary action. *See* DAVENPORT, *supra* note 30, at 3–4. *But see id.* at 33–34 (noting sterilization may be needed for criminals as well as the mentally ill). For Gosney and Popenoe, improvement was to come through compulsory sterilization. *See* GOSNEY & POPENOE, *supra*, at 116 (outlining the justifications for sterilization in the interest of the state).

49. GOSNEY & POPENOE, *supra* note 48, at ix–x.

50. *Id*. at 129–31.

51. *Id*. at v.

52. *Id*.

longer "patchwork" charity designed to address poverty and need once a child had been born; in its place, they wanted a policy that stopped some from having children and encouraged others of "good stock" to have more.[53]

Second, the eugenics literature also lamented the decline of the white race. Paul Popenoe and Roswell Hill Johnson's 1918 college textbook, *Applied Eugenics*, opened in apocalyptic terms with reference to the demographic catastrophe of the recent world war and the threatened decline of the white race.[54] Popenoe and Johnson distilled an argument that had been extensively developed by others. Even before the Great War, there was a robust literature warning of the decline of white supremacy. Madison Grant's *The Passing of the Great Race*, published in 1916, was an important popular work that raised the fear that the Nordic race was being overwhelmed, particularly in the United States.[55]

Grant's argument was amplified by other literature that warned of non-European people increasing in proportion to Europeans in the wake of the World War.[56] One of the most dramatic examples of this literature was Lothrop Stoddard's *The Rising Tide of Color Against White Supremacy*, published in 1920 by Charles Scribner's Sons.[57] The introductory paragraph laid out the dire situation, as Stoddard saw it, associated with the decline of the power of people of European descent.[58] Europeans had as recently as 1914 dominated Europe, North America, and Australia.[59] Drawing from the extensive reach of the European colonial powers and their American counterpart, Stoddard presented a story of white supremacy in which "vast areas inhabited by uncounted myriads of dusky folk obeyed the white

53. *Id*. at 122–24.

54. Edward Alsworth Ross, *Introduction* to POPENOE & JOHNSON, *supra* note 37, at xi.

55. *See* JONATHAN PETER SPIRO, DEFENDING THE MASTER RACE: CONSERVATION, EUGENICS, AND THE LEGACY OF MADISON GRANT 167 (2009). *See generally* MADISON GRANT, THE PASSING OF THE GREAT RACE (1916) (arguing the Nordic race was in decline in the United States due to the influx of immigrants).

56. *See* SPIRO, *supra* note 55, at 167; Michael Willrich, *The Two Percent Solution: Eugenic Jurisprudence and the Socialization of American Law, 1900–1930*, 16 L. & HIST. REV. 63, 98–99 (1998).

57. *See generally* LOTHROP STODDARD, THE RISING TIDE OF COLOR AGAINST WHITE WORLD-SUPREMACY (1920) (warning of the decline of the white race due to the population growth and migration of people of other races).

58. *Id*. at 3.

59. *Id*. ("Judged by accepted canons of statecraft, the white man towered the indisputable master of the planet. Forth from Europe's teeming mother-hive the imperious Sons of Japhet had swarmed for centuries to plant their laws, their customs, and their battle-flags at the uttermost ends of the earth.").

man's will."[60] Much had changed in only a few years. In the wake of World War I, the power of people of European descent was declining as their former colonies began to loosen the bonds of colonialism. Something needed to be done about it. The answer was found partly in eugenics.

Stoddard's message of white supremacy reached a wide audience, infusing the debate surrounding the eugenics movement. Scribner's, an important trade press, published *The Rising Tide of Color*, facilitating access to the general public.[61] Another indicator that Stoddard had reached a public audience is his appearance in F. Scott Fitzgerald's novel, *The Great Gatsby*. Tom Buchanan, a character in that novel who was known more for his impulsive action than his thoughtfulness, spoke about eugenics.[62] But he combined Henry Goddard's name with a misstatement of Lothrop Stoddard's book title when he asked, "Have you read 'The Rise of the Colored Empires' by this man Goddard?"[63] Goddard's book title was *The Kallikak Family*.[64] It was Stoddard's book that was titled *The Rising Tide of Color Against White World-Supremacy*.[65] Fitzgerald's reference suggests (in addition to the fact that Tom Buchanan was not very serious as a thinker or reader) that both Goddard's *Kallikak Family* and Stoddard's *Rising Tide of Color* were on Buchanan's mind just as the concern for white supremacy was on the minds of Americans in the 1920s.

Stoddard made several references to eugenics in *The Rising Tide of Color*, including in its conclusion.[66] Echoing W.E.B. Du Bois, but

60. *Id*. Stoddard began his scholarly life criticizing the Haitian Revolution, which had freed Haiti from slavery and French colonialism. *See* T. LOTHROP STODDARD, THE FRENCH REVOLUTION IN SAN DOMINGO, at vii (1914).

61. Originally founded in 1846, Charles Scribner's Sons was a prominent publishing company during this period and published the works of several prominent authors at the time, including Ring Larder, Earnest Hemingway, Marjorie Kinnan Rawlings, and F. Scott Fitzgerald. *See About Scribner*, SCRIBNER, http://www.simonandschusterpublishing.com/scribner/about-scribner.html [https://perma.cc/Z4MN-THG9].

62. F. SCOTT FITZGERALD, THE GREAT GATSBY 13 (1925).

63. *Id.* Buchanan goes on to explain that, "it's a fine book and everybody ought to read it. The idea is if we don't look out the white race will be—will be utterly submerged. It's all scientific stuff; it's been proved." *Id.* One wonders whether the fact that Scribner's published Fitzgerald's *The Great Gatsby*, as well as Madison Grant's *The Passing of the Great Race* and Stoddard's *The Rising Tide of Color*, influenced Fitzgerald's reference to Stoddard.

64. GODDARD, *supra* note 34.

65. STODDARD, *supra* note 57.

66. *Id*. at 306; *see also id*. at 220 ("Bolsheivism has vowed the proletarianzation of the world, beginning with the white peoples. To this end it not only foments social revolution within the white world itself, but it also seeks to enlist the colored races in its grand assault on civilization.").

viewing the issue from the other side of the color line, Stoddard wrote in his preface:

> The world-wide struggle between the primary races of mankind—the "conflict of color" as it has been happily termed—bids fair to be the fundamental problem of the twentieth century, and great communities like the United States of America, the South African Confederation, and Australasia regard the "color question" as perhaps the gravest problem of the future.[67]

In the conclusion, Stoddard linked the fate of the white race to that of eugenics. He looked forward to a future when white Americans would "take in hand the problem of race-depredation, and segregation of defectives and abolition of handicaps penalizing the better stock . . . ."[68] At that point, he argued, "[I]t will be possible to inaugurate positive measures of race-betterment which will unquestionably yield the most wonderful results."[69]

The white supremacy literature advanced two central themes that informed the underlying goals of the eugenics movement: first, the need to address the proliferation of undesirable non-European people, and second, the need for people of European descent to have more children. Popenoe and Johnson's textbook, *Applied Eugenics*, argued that well-educated people (particularly women) were not having enough children.[70] However, the eugenics literature also addressed the need for restrictions on reproduction for some people of all races. Samuel J. Holmes' 1921 book, *The Trend of the Race*, argued that "[t]he fact that defective mentality is strongly transmitted is established beyond the possibility of sane objection, and the particularly disastrous results that are pretty sure to follow from the mating of two mentally defectives have certainly been made

67. *Id.* at v (quoting STODDARD, *supra* note 60, at vii). In support of this claim, Stoddard quoted the following passage from Du Bois:

> These nations and races, composing as they do a vast majority of humanity, are going to endure this treatment just as long as they must and not a moment longer. Then they are going to fight and the War of the Color Line will outdo in savage inhumanity any war this world has yet seen.

Id. at 14 (quoting W. E. Burghardt DuBois, *The African Roots of War*, 115 ATLANTIC MONTHLY 707, 714 (1915)).

68. *Id.* at 309.

69. *Id.*

70. POPENOE & JOHNSON, *supra* note 37, at 240–42 (concluding that women educated at elite colleges were harming the future of the white race because they married less often and later in life).

sufficiently impressive by the work of recent investigators."[71] For this reason, the literature on the eugenics movement can be viewed as a potent mixture of white supremacy, state regulation, and patriarchy.

Faced with these growing concerns, there was a concerted attempt to use the state's power to implement such solutions. World War I, which had seen such extraordinary growth in the power of the United States and had resulted in such extraordinary destruction of lives and property in Europe, perhaps taught that generation of Americans that it was appropriate for the state to exercise such power. This attitude continued a trend of expansive government regulation—from regulation of business, such as rates in interstate commerce, protections for workers, and zoning—that had begun before the War.[72] This same attitude, focused on the supposed good to the general public, supported the view that the state could and should circumscribe the rights of individuals.[73] And so, over the

71. SAMUEL J. HOLMES, THE TREND OF THE RACE: A STUDY OF PRESENT TENDENCIES IN THE BIOLOGICAL DEVELOPMENT OF CIVILIZED MANKIND 40 (1921); *see also* Smith v. Command, 204 N.W. 141, 141–42 (Mich. 1925).

72. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: THE CRISIS OF AMERICAN LEGAL ORTHODOXY, 1870–1960, at 145–68, 213–46 (1992) (discussing regulation of property and business during the Progressive era); Paul Kens, *The Source of a Myth: Police Powers of the States and Laissez Faire Constitutionalism, 1900–1937*, 35 AM. J. LEGAL HIST. 70, 70–73 (1995) (locating the "myth" of the *Lochner* era within the time of non-regulation in the Progressive era); *see also* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 397 (1926) (upholding local regulation of land use through zoning); Muller v. Oregon, 208 U.S. 412, 422–23 (1908) (upholding a state statute that regulated certain working conditions involving women). One might think of the *Lochner v. New York*, 198 U.S. 45 (1905), decision as an important counter example, pointing against government regulation. But *Lochner*'s vision of restrictions on government regulation reflects several constitutional strands and even those were not the exclusive modes of constitutional interpretation in that era. *See, e.g.*, Paul Kens, *The Constitution and Business Regulation in the Progressive Era: Recent Developments and New Opportunities*, 56 AM. J. LEGAL HIST. 97, 98–101 (2016) (discussing conflicting interpretations of libertarian, natural law, and originalist elements in *Lochner* and its relationship to pro-regulatory ideas). It is now commonplace to see *Lochner* as a transition point on the way to Progressive jurisprudence rather than the dominant theme of the entire era. *See, e.g.*, Alfred L. Brophy, *Did Formalism Never Exist?*, 92 TEX. L. REV. 383, 394 (2013) (reviewing BRYAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING (2010)) (discussing literature on *Lochner* era). The Court's reasoning in *Lochner* was rejected in cases like *Muller*, 208 U.S. at 423, and later in cases like *Euclid*, 272 U.S. at 397, and *Buck v. Bell*, 274 U.S. 200, 207 (1927). It is perhaps not coincidental that Justice Holmes, the dissenter in *Lochner*, 198 U.S. at 74, was the author of the majority in *Buck*, 272 U.S. at 200. Moreover, particularly after 1910, there was growing support for pervasive government regulation. And as Herbert Hovenkamp has shown recently, there were multiple strands of economic thought in circulation at the time, each of which supported a regulatory approach. *See* HERBERT HOVENKAMP, THE OPENING OF AMERICAN LAW: NEOCLASSICAL LEGAL THOUGHT, 1870–1970, at 7 (2015).

73. *See Buck*, 274 U.S. at 207.

course of the 1920s and 1930s, state legislatures enacted legislation to provide for widespread sterilization, and courts began to routinely uphold such legislation.

How the three branches of state government came together to implement such solutions is discussed at length below. All three motivations—the quest for scientific solutions to human problems, the concern for white supremacy, and the belief that the government could and should address these concerns—merged together to provide a powerful impetus for the state-sponsored sterilization of approximately sixty thousand people from the 1920s through the 1950s in the United States.[74]

B. Making the Case for Sterilization

The panic in the eugenics and white supremacy literature translated well into arguments for legislative action. Concerns over decline of the white race and the need for legislative action were phrased starkly as concerns over costs of care and the decreasing mental ability of American citizens.[75]

One can trace the migration of eugenic ideas into public debate by looking at the revised and expanded version of Paul Popenoe and Roswell Johnson's college textbook, *Applied Eugenics*, from its first edition in 1918 to its second edition in 1933.[76] The book made the case for sterilization with an attack on the common people, arguing that the wealthier and better-educated people were being overtaken by the common people.[77] For instance, the authors focused on the fertility of women educated at elite colleges, noting that well-educated women were having too few children.[78] They noted that "[s]ince the greatest eugenics wastage at the present time is among college-educated women, these need particular help to orient

74. MARK A. LARGENT, BREEDING CONTEMPT: THE HISTORY OF COERCED STERILIZATION IN THE UNITED STATES 80 (2007); Robert J. Cynkar, Buck v. Bell*: "Felt Necessities" v. Fundamental Values?*, 81 COLUM. L. REV. 1418, 1439, 1446 (1981) (emphasizing the role of "scientific" thought in *Buck v. Bell* and its contribution to the case).

75. *See infra* Section II.B.

76. *See* PAUL POPENOE & ROSWELL HILL JOHNSON, APPLIED EUGENICS, at v (rev. ed. 1933) (describing the purpose and underlying motivations behind the revised edition).

77. *Id.* at 136–37 (making the case for negative eugenics); *id.* at 288–90 (discussing the impact of immigration on the racial makeup of the United States); Edward Alsworth Ross, *Introduction* to POPENOE & JOHNSON, *supra* note 37, at xi.

78. *See* POPENOE & JOHNSON, *supra* note 76, at 261; POPENOE & JOHNSON, *supra* note 37, at 262–65 (discussing relevant studies on the birth rates of educated women).

themselves."[79] The authors simultaneously argued that college-educated women should be encouraged to have more children, while other women—and men—should be denied the right to procreation.[80] Thus, there was a coercive side of the eugenics story, which both prevented procreation when people wanted it and encouraged it when they did not.

In their 1933 revised and expanded version of their textbook, Popenoe and Johnson provided a series of exercises for students, which were designed to transfer the eugenics movement from the classroom into the realm of advocacy. For instance, they asked:

> If you were a state legislator, would you think it more important at your first session to work for a sterilization bill, or to get appropriations for additional segregation facilities? Why?[81]
>
> Inquire of several persons whom you consider ultra-conservative and several others whom you consider to be radically-minded, whether they approve of eugenics. Classify their answers.[82]
>
> Discuss in some detail the selective nature of deaths from automobile accidents.[83]
>
> If there is a considerable foreign-born population in your community, tabulate the birth announcements in the newspapers for a few weeks and classify them, so far as can be done by family names, on the basis of their nationality.[84]
>
> Ask 10 students how many brothers and sisters they have. Note how many of them come from families that are large enough to perpetuate themselves.[85]
>
> A philanthropist is contemplating a bequest for the advancement of eugenics. He is in doubt as to whether he should leave this to promote (a) research on the genetics of human traits, or (b) work along educational and legislative lines

79. POPENOE & JOHNSON, *supra* note 76, at 261; POPENOE & JOHNSON, *supra* note 37, at 265 (noting the disparity in birth rates among educated women and suggesting that "education is tending toward race suicide").

80. POPENOE & JOHNSON, *supra* note 76, at 136–37, 261; POPENOE & JOHNSON, *supra* note 37, at 262–65.

81. POPENOE & JOHNSON, *supra* note 76, at 408.

82. *Id.* at 413.

83. *Id.* at 406.

84. *Id.* at 407.

85. *Id.*

> to put the eugenic program into effect. He asks your advice. What have you to say?[86]
>
> Which do you think is the superior right: the right of every individual to marry and have children, or the right of society to prevent the reproduction of the unfit? Why?[87]

This was by no means some fringe academic endeavor, but one that was embraced by academic institutions. During this period, eugenics was taught at 376 colleges and universities across the country.[88] Through this type of "education," eugenics ideas flowed from popular culture into the legislature, and then were approved by the courts.[89] As Greg Dorr has shown, eugenics ideas were popular and frequently taught at the University of Virginia from the early 1900s through World War II.[90] At the University of North Carolina at Chapel Hill, famed sociology professor Rupert Vance taught, for several years, a course on population that addressed "problems of race, immigration, and eugenics."[91] Even though Vance's book *Human Factors in Cotton Production* attributed problems with rural poverty to environment rather than heredity,[92] Vance's portrayal of rural poverty and the difficulty those in poverty faced in struggling out of it seems to have

86. *Id*.

87. *Id*.

88. COHEN, *supra* note 3, at 4; *see also* POPENOE & JOHNSON, *supra* note 76, at v (noting the prior edition's "widespread use as a college textbook").

89. Popenoe and Johnson's conclusion was that the state would sometimes need to exercise its power coercively. *See* POPENOE & JOHNSON, *supra* note 76, at 136 ("Every facility should be available to undesirable parents for the prevention of conception, but when they are unwilling to control their own fecundity the state will in some cases have to intervene by selective sterilization."). University of California at Berkeley Professor Samuel J. Holmes' 1936 textbook *Human Genetics and Its Social Import* included a final chapter entitled "Proposed Measures for Race Betterment." SAMUEL J. HOLMES, HUMAN GENETICS AND ITS SOCIAL IMPORT 359 (1936). It presented a number of discussion questions, such as "[d]o you think that any kinds of criminals . . . should be sterilized on either eugenic or other grounds? . . . In general what kinds of persons, if any, should be sterilized? . . . Make a list of feasible measures for promoting race betterment." *Id.* at 385–86.

90. DORR, *supra* note 14, at 70–72, 106–07.

91. *See* UNIV. OF N.C., UNIVERSITY OF NORTH CAROLINA RECORD: THE GENERAL CATALOGUE, CATALOGUE ISSUE 1937–1938, at 224 (1938), http://library.digitalnc.org/cdm/ref/collection/yearbooks/id/12731 [https://perma.cc/6FT8-WTLV]; UNIV. OF N.C., UNIVERSITY OF NORTH CAROLINA RECORD: THE GENERAL CATALOGUE, CATALOGUE ISSUE 1938–1939, at 263 (1939), http://library.digitalnc.org/cdm/ref/collection/yearbooks/id/12897 [https://perma.cc/G93F-8URB].

92. RUPERT B. VANCE, HUMAN FACTORS IN COTTON CULTURE: A STUDY IN THE SOCIAL GEOGRAPHY OF THE AMERICAN SOUTH 295 (1929) ("There exists a kind of natural harmony about the cotton system. Its parts fit together so perfectly as to suggest the fatalism of design.").

supported the idea that something had to be done, perhaps through eugenics.[93] Before Vance, the course was taught by T.J. Woofter,[94] whose 1933 book *Races and Ethnic Groups in American Life* spoke of problems with assimilation of foreign-born migrants.[95]

C. The Legal Mindset: 1910s and 1920s

The ideas generated in the public and scholarly eugenics movement migrated quickly into the legislative and judicial spheres. The first eugenics legislation in the United States was passed in 1907 in Indiana.[96] By 1922, Harry Laughlin presented a model sterilization statute in his extended study, *Eugenical Sterilization in the United States*.[97] He later described sterilization as an important component of state policy "to control both the quality and quantity of its future population."[98] Laughlin acknowledged in 1926 that Michigan and Virginia had already upheld broad eugenics laws[99] and suggested that the legislation should apply to people in both state institutions and the community.[100] His pamphlet provided two new model statutes based on what courts had already upheld.[101]

State courts showed substantial unease with eugenics legislation in the 1910s and early 1920s. Courts reviewed two different types of statutes during this time: statutes that provided for sterilization of criminals and statutes that provided for sterilization of developmentally disabled people. Analysis of criminal sterilization considered whether sterilization was cruel and unusual punishment and whether imposition of a particular sterilization violated a criminal

93. *See* Stephen Fender, *Poor Whites and the Federal Writers' Project: The Rhetoric of Eugenics in the Southern Life Histories*, *in* POPULAR EUGENICS: NATIONAL EFFICIENCY AND AMERICAN MASS CULTURE IN THE 1930S, at 140, 148 (Susan Currell & Christina Cogdell eds., 2006).

94. UNIV. OF N.C., UNIVERSITY OF NORTH CAROLINA RECORD: THE GENERAL CATALOGUE, CATALOGUE ISSUE 1936–1937, at 211 (1937), http://library.digitalnc.org/cdm/ref/collection/yearbooks/id/12707 [https://perma.cc/NCD9-QY4Q].

95. T.J. WOOFTER JR., RACES AND ETHNIC GROUPS IN AMERICAN LIFE 4 (1933).

96. Act of Mar. 9, 1907, ch. 215, 1907 Ind. Acts 377 (authorizing "the sterilization of mentally defective persons") (repealed 1974). A fairly comprehensive list of state eugenics statutes appears in F.C.N., *Constitutional Law—Police Power—Sterilization of Defectives*, 22 GEO. L.J. 616, 617 (1933–1934).

97. HARRY H. LAUGHLIN, EUGENICAL STERILIZATION IN THE UNITED STATES 446–51 (1922) (providing model sterilization statute).

98. HARRY H. LAUGHLIN, EUGENICAL STERILIZATION: 1926, at 2 (1926).

99. *Id*. at 4.

100. *Id.* at 5.

101. *Id.* at 64–75.

defendant's right to due process.[102] Analysis of non-criminal sterilization focused on equal protection challenges—allegations that some similarly situated people were not being sterilized.[103]

Legal scholars debate whether *Lochner v. New York*[104] and its jurisprudential era during the early twentieth century, remembered for its emphasis on "economic liberty," facilitated the demise of substantive due process rights in favor of the general welfare[105] or was actually a precursor to the establishment of the fundamental rights doctrine in the Warren court.[106] While the eugenics cases of the early twentieth century do not answer such larger questions, they demonstrate that *Griswold v. Connecticut*[107] was not the first time that the courts wrestled with whether a person has a right to make his or her own choices about whether to beget children.[108] The courts articulated their concerns stridently in these early stages of sterilization decisions, albeit in their own language, on both criminal and non-criminal sterilizations. But across the country, states subsequently lowered their voices and changed the subject. *Substantive* questions turned to concerns about process as more and more statutes came before state courts. The focus was no longer on use of sterilization for punishment, but rather on general welfare. Slowly, the legal community went the way of popular thinking at the time and ultimately sanctioned sterilization statutes. While courts initially expressed skepticism of eugenics, they increasingly accepted sterilization programs as a valid exercise of state power.

1. The "Cruel and Unusual Punishment" Perspective

The first appellate case to address the constitutionality of sterilization legislation was the Washington Supreme Court's 1912

102. *See, e.g.*, Mickle v. Henrichs, 262 F. 687, 690 (D. Nev. 1918); Davis v. Berry, 216 F. 413, 415–16 (S.D. Iowa 1914), *vacated as moot sub nom*, Berry v. Davis, 242 U.S. 468, 469–70 (1917); State v. Feilen, 126 P. 75, 76–77 (Wash. 1912).

103. *See* Smith v. Bd. of Examiners of Feeble-Minded, 88 A. 963, 967 (N.J. 1913); *infra* Section II.C.2.

104. 198 U.S. 45 (1905).

105. Joshua D. Hawley, *The Intellectual Origins of (Modern) Substantive Due Process*, 93 TEX. L. REV. 275, 276–81 (2014); *see also* David E. Bernstein, Lochner v. New York*: A Centennial Retrospective*, 83 WASH. U. L. Q. 1469, 1470–71 (2005) (discussing the traditional understanding of *Lochner* and its progeny).

106. David Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 52–58 (2003); Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 487–89 (2004).

107. 381 U.S. 479 (1965).

108. *See id*. at 494–96.

opinion in *State v. Feilen*,[109] which upheld a statute allowing vasectomies to be performed on men convicted of rape.[110] The court held that since the crime was so heinous and vasectomies were relatively painless, the procedure was not cruel punishment.[111] The court analyzed the issue as a balance between individual liberty and public welfare: "[W]e cannot hold that vasectomy is such a cruel punishment as cannot be inflicted upon appellant for the horrible and brutal crime [of rape] which he has been convicted."[112]

In another early case, the United States District Court for the Southern District of Iowa in *Davis v. Berry*[113] provided an extensive articulation of why sterilization is cruel and unusual punishment due to its infringement on a person's basic rights:

> [E]ach operation is to destroy the power of procreation. It is, of course, to follow the man during the balance of his life. The physical suffering may not be so great, but that is not the only test of cruel punishment; the humiliation, the degradation, the mental suffering are always present and known by all the public, and will follow him wheresoever he may go. This belongs to the Dark Ages.[114]

The court drew particular emphasis on the degradation of the human body that accompanies sterilization.[115] The court went so far as to imply that there exists a fundamental right to beget children, holding that the statute unconstitutionally infringed on a man's right "to enter into the marital relation."[116] The United States District Court for the District of Nevada drew a similar conclusion in its 1918 decision *Mickle v. Henrichs*.[117] Applying this logic to the prisoner found guilty of rape, the court stated "[t]rue, rape is an infamous crime; the punishment should be severe; but even for such an offender the way to an upright life, if life is spared, should not be unnecessarily obstructed."[118] By arguing that sterilization "obstructs" a person's ability to lead an upright life, the court conceptualized procreation as fundamental to living life.

109. 126 P. 75 (Wash. 1912).
110. *Id*. at 78.
111. *Id.* at 77–78.
112. *Id.* at 78.
113. 216 F. 413 (S.D. Iowa 1914), *vacated as moot*, Berry v. Davis, 242 U.S. 468 (1917).
114. *Id*. at 416.
115. *See id.* (discussing the historical use of castration as a form of punishment).
116. *See id.* at 419.
117. 262 F. 687, 690 (D. Nev. 1918) (quoting *Davis*, 216 F. at 416).
118. *Id*. at 691.

2. Fundamental Rights in Equal Protection Challenges

Sterilization statutes also raised constitutional concerns under the Fourteenth Amendment. Equal protection challenges to sterilization statutes arose from individuals being institutionalized for "feeble-mindedness" or other mental health reasons, as opposed to the cruel and unusual punishment challenges furthered by convicted criminals. Courts were quick to note that the state, by having a sterilization option for only those confined to state institutions and not for those people with the same ailments living outside institutions, was treating people in the same class differently.[119] In its *In re Thompson*[120] decision in 1918, the Albany County Supreme Court of the State of New York held a sterilization board unconstitutional on the grounds that "[t]he law certainly denies to some persons of a class and similarly situated the protection which is afforded to others of the same class."[121] In the same year, the Michigan Supreme Court struck down a similar statute on similar grounds, explaining:

> [T]he Legislature selected out of what might be termed a natural class of defective and incompetent persons only those already under public restraint, leaving immune from its operation all others of like kind to whom the reason for the legislative remedy is normally and equally, at least, applicable, extending immunities and privileges to the latter which are denied to the former.[122]

Moreover, these courts found that the class distinction did not accomplish the objectives for which the sterilization program was established, since institutionalized persons were less likely to procreate than non-institutionalized people anyway.[123]

But the discussion often extended beyond the unreasonableness of this distinction into the realm of why sterilization raised such large

119. *See, e.g.*, *In re* Thomson, 169 N.Y.S. 638, 644 (N.Y. Sup. Ct. 1918), *aff'd sub nom.*, Osborn v. Thomson, 171 N.Y.S. 1094 (N.Y. App. Div. 1918); Haynes v. Lapeer Circuit Judge, 166 N.W. 938, 940 (Mich. 1918).

120. 169 N.Y.S. 638 (N.Y. Sup. Ct. 1918).

121. *Id.* at 644.

122. *Haynes*, 166 N.W. at 940.

123. *See, e.g.*, Smith v. Bd. of Exam'rs of Feeble-Minded, 88 A. 963, 966 (N.J. 1913) ("The objection, however, is not that the class is small as compared with the magnitude of the purpose in view, which is nothing less than the artificial improvement of society at large, but that it is singularly inept for the accomplishment of that purpose in this respect, viz., that if such object requires the sterilization of the class so selected, then a fortiori does it require the sterilization of the vastly greater class who are not protected from procreation by their confinement in state or county institutions.").

concerns in the first place. In *In re Thompson*, the New York court declared that:

> The entire purpose of the enactment seems to be to save expense to future generations in the operation of eleemosynary institutions . . . . Such does not seem to this court to be the proper exercise of the police power. It seems to be a tendency almost inhuman in its nature.[124]

The Supreme Court of New Jersey likewise labeled its state's sterilization statute *inhumane*, noting "[t]he palpable inhumanity and immorality of such a scheme forbids us to impute it to an enlightened Legislature."[125] The court's opinion foreshadowed just how dangerous involuntary sterilization could be for society:

> There are other things besides physical or mental diseases that may render persons undesirable citizens, or might do so in the opinion of a majority of a prevailing Legislature. Racial differences, for instance, might afford a basis for such an opinion in communities where that question is unfortunately a permanent and paramount issue.[126]

The court clearly stated that once the government starts sterilizing on "feeble-mindedness" grounds, race and poverty could logically follow as valid reasons to refuse the right of procreation. This prediction was eerily prescient considering that a disproportionate number of people sterilized in North Carolina were indeed poor and black.[127]

3. From Substantive Concerns to Procedural Safeguards

After these early cases, however, the tone began to shift. Courts struggled with the distinction between this new idea of substantive rights, which the United States Supreme Court had not yet fully articulated, particularly in the context of reproductive rights, and the simpler option of invalidating statutes on procedural due process grounds. *Davis v. Berry* opinion illustrates this tension:

> One of the rights of every man of sound mind is to enter into the marriage relation. Such is one of his civil rights, and

124. *In re Thomson*, 169 N.Y.S. at 644.

125. *Bd. of Exam'rs of Feeble-Minded*, 88 A. at 967.

126. *Id.* at 966.

127. Gregory N. Price & William A. Darity Jr., *The Economics of Race and Eugenic Sterilization in North Carolina: 1958–1968*, 8 ECON. & HUM. BIOLOGY 261, 269 (2010) (observing that as the percentage of a county's African American population grew so too did the number of sterilizations in the 1960s).

> deprivation or suspension of any civil right for past conduct is punishment for such conduct, and this fulfills the definition of a bill of attainder, because a bill of attainder is a legislative act which inflicts punishment without a jury trial.[128]

In one breath, the court implied that every person has a right to have children (through marital relations) and, at the same time, stated that the reason for the sterilization statute's invalidity is the lack of due process afforded by a jury trial. The court was quick to jump from the idea of liberty to a procedural argument.

Similarly, the Indiana Supreme Court struck down its sterilization statute on grounds that inmates were not afforded due process.[129] The hearings were held in secret and inmates had no opportunity to present evidence or cross-examine witnesses.[130] But in its discussion, the court wrestled with its inclination to invalidate the statute on individual liberty grounds.[131]

These opinions suggest that the courts wanted to make substantive rights arguments, but understood that procedural findings were easier to justify. Alternatively, these decisions could be explained by the absence of substantive due process rights outside of property and contracts and the evolving view of the courts on individual rights within this realm.[132]

II. THE LEGAL JUSTIFICATION FOR STERILIZATION

The era of judicial skepticism drew to a close in the wake of the popular literature on eugenics, the legislation sweeping the country, and law review commentary. The Michigan Supreme Court and Supreme Court of Virginia both upheld sterilization statutes on substantive due process grounds.[133] The relevant law reviews in these two states recommended and endorsed the rationale of those decisions, followed by legal scholars across the country.[134] And finally, the United States Supreme Court officially held that a state's involuntary sterilization program, if effectuated pursuant to some

128. *Id.* at 419.

129. Williams v. Smith, 131 N.E. 2, 2 (Ind. 1921).

130. *Id.*

131. *See id*. ("[W]holly aside from the proposition of cruel and unusual punishment, and infliction of pains and penalties by the legislative body through an administrative board, it is very plain that this act is in violation of the Fourteenth Amendment to the federal Constitution in that it denies appellee due process.").

132. *See* WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886–1937, at 10 (1998).

133. *See infra* Section II.A.

134. *See infra* Section II.B.

kind of set process, was not a violation of the Fourteenth Amendment.[135]

A. State Courts Establish a New Framework for Analyzing Sterilization

The first major robust defense of eugenics legislation by a state court came from the Michigan Supreme Court in 1925 in *Smith v. Command*.[136] The court moved systematically through each of the legal challenges to sterilization: reasonable use of the police power,[137] cruel and unusual punishment,[138] equal protection,[139] and procedural due process.[140]

The thrust of the holding in *Smith* was that the sterilization law fell within the ambit of Michigan's police power because controlling feeble-mindedness was in the public interest.[141] The court started by setting out two issues as conclusive facts: first, feeble-mindedness is hereditary, making sterilization an unquestionably effective means of decreasing the defect within the population;[142] and second, feeble-minded people are indisputably "a serious menace to society," because eight times as many lived in Michigan as could be institutionalized.[143] These assertions disregarded any scientific distinctions that could be made between different types of mental disorders and assumed that institutionalization was the only option for dealing with people suffering from mental disorders.[144]

Under this framework, the Michigan Supreme Court evaluated the right to beget children against the public's interest in preventing the procreation of feeble-minded individuals. The court recognized that "[i]t is true that the right to beget children is a natural and constitutional right."[145] However, the court quickly qualified this natural right: "Measured by its injurious effect upon society, what right has any citizen or class of citizens to beget children with an inherited tendency to crime, feeble-mindedness, idiocy, or

135. *See infra* Section II.C.
136. 204 N.W. 140 (Mich. 1925).
137. *Id.* at 142.
138. *Id.* at 142–43.
139. *Id.* at 143.
140. *Id.* at 144–46.
141. *Id.* at 141–42.
142. *Id.* at 142.
143. *Id.*
144. *See id.*
145. *Id.* at 142.

imbecility?"[146] In sum, it is reasonable for the legislature to remove the ability of these people to procreate because they have no right to have children who will certainly have mental defects and thereby impose a burden on the state.[147] By qualifying the right to beget children, the court was able to quell the lingering questions raised by other courts.

The majority next turned to the cruel and unusual punishment issue. The court determined that sterilization was analogous to vaccination, and thus not punitive.[148] Part of the rationale for this conclusion was that the operations were not particularly painful to the patients, and thus, "the results are beneficial both to the subject and to society."[149] Recognizing that other courts had disagreed with this position, the majority took careful steps to distinguish the Michigan law from those in other states. The majority noted this law was unlike the laws at issue in *Davis v. Berry* and *State v. Feilen*,[150] because in those cases the law only imposed sterilization on convicted felons, not people who were institutionalized only for feeble-mindedness.[151]

The majority also addressed whether the sterilization statute violated the equal protection clause on grounds that it did not apply to all mental defectives.[152] The statute defined the class of people who would be affected by sterilization as follows:

> (a) That the said defective manifests sexual inclinations which make it probable that he will procreate children unless he be closely confined, or be rendered incapable of procreation; (b) That children procreated by said adjudged defective will have an inherited tendency to mental defectiveness; and (c) That there is no probability that the condition of said person will

146. *Id.*
147. *See id.*
148. *Id.* at 142.
149. *Id.* at 142–43.
150. *Id.* at 142 (citing Davis v. Berry, 216 F. 413, 414 (S.D. Iowa 1914), *vacated as moot*, Berry v. Davis, 242 U.S. 468 (1917); State v. Feilen, 126 P. 75, 76 (Wash. 1912)).
151. *Id.* The court also concluded the holding in *Smith v. Board of Examiners* was irrelevant in this context because it dealt only with epileptics and did not arrive at the cruel and unusual punishment argument. *Id.*; *see* Smith v. Bd. of Exam'rs of Feeble-Minded, 88 A. 963, 966 (N.J. 1913). Furthermore, the court distinguished the law at issue in *Mickle v. Henrichs* from the Michigan law because it only applied to people who had raped children under 10 years old. *Smith*, 204 N.W. at 142; *see* Mickle v. Henrichs, 262 F. 687, 691 (D. Nev. 1918).
152. *Smith*, 204 N.W. at 143.

> improve so that his or her children will not have the inherited tendency aforesaid . . . .[153]

This classification is actually narrower than if the statute had enforced sterilization on all mental defectives. Thus, it ensures that there is a reason for conducting the sterilization, because the sterilized person's children would also need to be institutionalized for being mentally defective.[154] Again, the court analogized the statute to existing public health regulations, finding that it was reasonable for the legislature to apply the statute to people most likely to pass on mental defects, just as the legislature was justified in requiring vaccinations of people most likely to be afflicted with smallpox.[155] In both this argument and the cruel and unusual punishment argument, the court depicted mental deficiencies as purely medical problems, thereby facilitating justification of a "medical" remedy through sterilization.[156] Again, the court shifted the analysis away from a discussion of fundamental liberty and into one about "procedure," this time a medical procedure.

The court's equal protection analysis did conclude that a second section of the statute was invalid due to its application to mentally defective people unable to care for their children without any finding that the children themselves would be mentally defective.[157] The court took issue with the notion that only poor feeble-minded people would be subject to this part of the statute; if they were financially able to support any potential children, then they would not be sterilized. In that sense, the court observed that the law "carves a class out of the class," making poor feeble-minded people subject to different laws than wealthier feeble-minded people.[158] This objection to the law is particularly noteworthy for North Carolina's history, where

153. Act of May 25, 1923, Pub. Act No. 285, sec. 7(1), 1923 Mich. Pub. Acts 453, 455 (repealed 1974). The law was entitled "AN ACT to authorize the sterilization of mentally defective persons." *Id.* at 453.

154. *See id*.

155. *Smith*, 204 N.W. at 143.

156. *Id*.

157. *Id.* at 144. The classification language of this provision was:

> (a) That said defective manifests sexual inclinations which make it probable that he will procreate children unless he be closely confined, or be rendered incapable of procreation; and (b) that he would not be able to support and care for his children, if any, and such children would probably become public charges by reason of his own mental defectiveness.

Act of May 25, 1923, Pub. Act No. 285, sec. 7(2), 1923 Mich. Pub. Acts 453, 455 (repealed 1974).

158. *Smith*, 204 N.W. at 144.

preventing the procreation of poor people became a major justification for the expansion of the eugenics program in later years.[159]

The court held that the statute's procedure for identifying people to be sterilized did not violate due process.[160] The procedure required service of process upon the person to be sterilized and his or her relatives (and if no relatives could be found, upon a guardian ad litem).[161] In addition, the statute provided several opportunities for the person facing sterilization to contest the procedure at a hearing or a jury trial, upon request, and then on appeal.[162] Furthermore, unlike other states where the determination was relegated to a board or administrative agency, all sterilization proceedings occurred in the courts with the added support of a panel of three physicians.[163]

The *Smith* court emphasized the importance of deference to the legislature, recognizing that while sterilization infringes upon a civil liberty, "our race" faces enormous challenges in sustaining itself:

> The Michigan statute is not perfect. Undoubtedly time and experience will bring changes in many of its workable features. But it is expressive of a state policy apparently based on the growing belief that, due to the alarming increase in the number of degenerates, criminals, feeble-minded, and insane, our race is facing the greatest peril of all time. Whether this belief is well founded is not for this court to say. Unless for the soundest constitutional reasons, it is our duty to sustain the policy which the state has adopted. As we before have said, it is no valid objection that it imposes reasonable restraints upon natural and constitutional rights. It is an historic fact that every forward step in the progress of the race is marked by an interference with individual liberties.[164]

The use of the term "our race" is critical here. The *Smith* court initially justified its conclusion by focusing on the imposition of the costs of institutionalization on the public, which in many ways differs from the perils of "our race."[165] In their view, the public interest includes not only plain costs, but also the quality of the human race.

159. *See, e.g.*, BROWN, PURPOSE, STATUTORY PROVISIONS, FORMS, AND PROCEDURE, *supra* note 43, at 10; SCHOEN, *supra* note 14, at 134.

160. *Smith*, 204 N.W. at 144.

161. Act of May 25, 1923, Pub. Act No. 285, sec. 4, 1923 Mich. Pub. Acts 453, 454 (repealed 1974).

162. *Id.*

163. *Id.*

164. *Smith*, 204 N.W. at 145.

165. *See id.* at 142.

The economic argument that justified sterilization of the mentally disabled aligned naturally with the notion of racial purity that was starting to take a cultural hold.

Three dissenting justices vigorously objected to the statute on the grounds that it violated a unique provision of the Michigan Constitution, requiring that "[i]nstitutions for the benefit of those inhabitants who are deaf, dumb, blind, feebleminded or insane shall always be fostered and supported."[166] Since the statute only applied to those who were segregated with the purpose of releasing them from the state institutions, sterilizing these people would have removed their access to the institutions to which they were constitutionally entitled.[167] Justice Howard Wiest, who authored the dissent, thought sterilization was a relic of the ancient world; after discussing sterilization in Rome, which had been justified on the costs it saved, he concluded that "[t]his inhuman law was evidently deemed eugenistically essential to the welfare of the Roman Republic. It was eugenics in its infancy, bent on the survival of the fittest."[168]

The heart of Justice Wiest's dissent though was that sterilization violates the cruel and unusual punishment clause. He focused his discussion not on case law, but on how barbaric the practice of sterilization is, equivalent to savagery and castration, and how it was rejected by the authors of the Michigan Constitution.[169] Justice Wiest noted that the cruel and unusual punishment clause "struck at the evil evidenced in man's inhumanity in the past, and placed a bar at any renewal thereof, whether in the name of science or penology, eugenics or human procreation regulation by mutilation."[170] Accordingly, the protections under this clause extend to "all new forms of cruelty, good or bad intentioned, and all old forms disguised under new scientific names and theories, and pressed with the zeal and intolerance of converts obsessed with the fallible wisdom of questionable opinions."[171]

The dissent emphasized that the cruel and unusual punishment clause is a limitation on the police power applicable to all citizens, not just criminals.[172] The dissent also contested the scientific conclusions adopted by the majority that feeble-mindedness would be inherited

166. *Id.* at 146 (Wiest, J., dissenting) (quoting MICH. CONST. art. XI, § 15).
167. *Id.*
168. *Id.* at 147.
169. *Id.* at 148.
170. *Id.*
171. *Id.*
172. *Id.* at 149.

by the offspring of a feeble-minded person, relying on a variety of scientific studies disputing this finding.[173] This argument was an ardent defense of the right to bodily integrity inherent to all citizens. Though the jurisprudence of individual rights had not yet developed, Justice Wiest referred obliquely to the "inherent right of bodily integrity" in addition to the cruel and unusual punishment clause.[174]

Wholly absent from the dissent's discussion, however, was the question of the public welfare and the dollars and cents required to provide for the general public. The majority's analysis in *Smith* was a calculus that weighed the overall cost to the individual against the benefits to society:

> It is known by conservative estimate that there are at least 20,000 recognized feeble-minded persons in the State of Michigan—eight times as many as can be segregated in State institutions. The Michigan Home and Training School at Lapeer is full to overflowing with these unfortunates, and hundreds of others are on the waiting lists. That they are a serious menace to society no one will question.
>
> In view of these facts, what are the legal rights of this class of citizens as to the procreation of children? It is true that the right to beget children is a natural and constitutional right, but it is equally true that no citizen has any rights superior to the common welfare. Acting for the public good, the state, in the exercise of its police powers, may always impose reasonable restrictions upon the natural and constitutional rights of its citizens. Measured by its injurious effect upon society, what right has any citizen or class of citizens to beget children with an inherited tendency to crime, feeble-mindedness, idiocy or imbecility?[175]

In short, the court labeled the purity of the human race a "benefit" and the offspring of mentally defective people a "cost." The majority's transition from discussions of substantive rights to a cost-benefit analysis established language that courts could use to analyze sterilization. That framework concentrated on economics as opposed to the more nebulous discussion of human liberties that the *Smith* dissent used.[176]

173. *Id.* at 149–52.

174. *Id.* at 148.

175. *Id.* at 142 (majority opinion).

176. *Compare id.* at 142 (describing the prevalence of "feeble-mindedness" as "a social and economic problem of grave importance"), *with id.* at 148 (Weist, J., dissenting)

The next state to uphold a sterilization statute was Virginia. The Supreme Court of Virginia's 1925 decision in *Buck v. Bell*[177] involved a Virginia law authorizing sterilization of the feeble-minded, among others.[178] The court held that since the statute required an adequate notice, a hearing, and a right to appeal, it did not violate due process.[179] Additionally, the court held that the law was not penal and therefore was not cruel and unusual punishment.[180] The court also upheld the statute as a valid use of police power.[181] Finally, in examining the equal protection clause, the court determined that there was no class distinction since the institutions were open to all feeble-minded for commitment.[182]

The Supreme Court of Virginia decided *Buck v. Bell* on November 12, 1925, several months after Michigan's *Smith v. Command*.[183] The Virginia opinion in *Buck* disclosed none of the qualms of the dissenters in *Smith*; however, it also did not have the expansive justification seen in *Smith. Buck* had neither the intra-court conflict associated with *Smith*, nor could it be characterized as providing broad judicial support for sterilization, as was *Smith*. In fact, the Virginia court gave great deference to the legislature, drawing on a well-established judicial deference to legislatures.[184]

In addition, while the *Buck* court found that sterilization would benefit the state, the court also reasoned that it would benefit Carrie Buck herself.[185] Carrie Buck was seventeen years old, the daughter of a "feeble-minded" mother and the mother of an illegitimate, "feeble-

(arguing sterilization violates the cruel and unusual punishment clause and "inherent right of bodily integrity").

177. 130 S.E. 516 (Va. 1925).

178. *Id.* at 517.

179. *Id.* at 518–19.

180. *Id.* at 519.

181. *Id.* at 520.

182. *Id.*

183. *Id.*; Smith v. Command, 204 N.W. 140, 140 (Mich. 1925) (decided on June 18, 1925).

184. As Justice George Sutherland wrote in *Adkins v. Children's Hospital of the District of Columbia* in 1923, "[e]very possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt." 261 U.S. 525, 544, 562 (1923) *overruled by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (concluding, ultimately, that the act was unconstitutional). That was the nature of constitutional law at the time, which deferred to legislative judgments about efficacy. Some, like Harvard Law Professor Thomas Reed Powell, understood that "calm as may be the judicial recitals of these issues of personal liberty, the conflicts are ones that stir men's souls." Thomas Reed Powell, *The Supreme Court and the State Police Power*, *1922–1930*, 17 Va. L. REV. 765, 786 (1931). But Powell was still ahead of his time; the dominant mode of proceeding was to uphold sterilization. *See infra* Part III.A.

185. *Buck*, 130 S.E. at 518.

minded" child.[186] The court reasoned that, if not sterilized, Carrie Buck would be institutionalized until she was unable to conceive (sterilization "by nature"), but with the help of Virginia's sterilization program, she would be permitted to leave institutional care earlier in her life.[187] Not surprisingly, the general welfare was the justification for involuntarily institutionalizing Carrie Buck in the first place.[188] Following the decision by the Supreme Court of Virginia, the *Buck* case then proceeded to the United States Supreme Court, where state sterilization programs would receive official judicial approval as a valid exercise of the police power.[189]

B. The Legal Community's Contributions to, and Acceptance of, the New Framework

Prior to the decisions in both *Smith* and *Buck*, Aubrey Strode, a young lawyer in Lynchburg, Virginia who would soon become the lawyer for the state in *Buck v. Bell*, published a short examination and defense of the Virginia statute, "Sterilization for Defectives," in the *Virginia Law Review* in 1924.[190] Strode took up the question of whether the state's police power was broad enough to encompass sterilization.[191] Strode reframed the issue in terms of protecting the people sterilized from procreation.[192] He noted that it was clear that the state could institutionalize people and thereby prevent them from having children.[193] But, he questioned whether the state could take on a more active role:

> Is this the sole remedy available to organized society? Must such persons languish for life in custody and must the government bear the perpetual burden of thus maintaining

186. *Id.* at 517; *see* Paul Lombardo, *Three Generations, No Imbeciles: New Light on* Buck v. Bell, 60 N.Y.U. L. REV. 30, 61 (1985) (describing Carrie Buck's family and disputing their alleged "feeble-mindedness"). Notably, Lombardo later authored a book with a similar name. LOMBARDO, *supra* note 12.

187. *Buck*, 130 S.E. at 517–18.

188. Later sources have suggested that neither Carrie Buck nor her daughter were actually "feebleminded" in reality. *See* Lombardo, *supra* note 186, at 61. While less is known about Carrie's mother, Emma Buck, she was still not even considered to be an "imbecile" by the medical examiners at the time. *Id.*

189. Buck v. Bell, 274 U.S. 200, 208 (1927).

190. Aubrey E. Strode, *Sterilization of Defectives*, 11 VA. L. REV. 296, 296 (1925); *see also* DORR, *supra* note 14, at 222–29 (discussing the academic defense of sterilization in Virginia that surrounded Strode's advocacy of sterilization); J. Miller Kenyon, *Sterilization for the Unfit*, 1 VA. L. REV. 458, 469 (1914) (advocating for the sterilization of the unfit).

191. Strode, *supra* note 190, at 296.

192. *Id.*

193. *Id.*

> them if it would protect itself against the multiplication of their kind, and must this be so even when through a simple surgical operation not appreciably dangerous and involving the removal of no sound organs from the body such persons might be discharged from custody and become self supporting to the great advantage both of themselves and of society?[194]

Strode posited whether "one liberty" may be "thus restored through the deprivation of another liberty?"[195] Taking a moderate approach, Strode emphasized that the Virginia statute was based on eugenic principles, but that it only allowed sterilization when there was a judicial determination that "the welfare of the inmate also will be promoted thereby."[196] He subsequently acknowledged, "[t]he field here is a broad one involving what were formerly at least regarded as elemental personal rights."[197] Strode's article appeared as he was bringing the *Buck* case as a test of the statute's constitutionality through the Virginia courts,[198] building on other law review articles as well as the popular and academic literature on sterilization.[199]

The legal community chose to follow the majority opinion in *Smith v. Command*, not the lengthy, passionate dissent. University of Michigan Law Professor Burke Shartel's article "Sterilization of Mental Defectives," appeared in the *Michigan Law Review* in 1925 in defense, and one might also say, in celebration of *Smith*.[200] In his article, Shartel provided not only an explanation of the Michigan law for sterilization, but also a defense of *Smith*.[201] He focused on the Michigan legislature's finding of "facts" regarding the effects of sterilization, arguing that "the court ought to require the facts on the basis of which the constitutionality of a law is assailed to be established by the assailant 'beyond a reasonable doubt.' "[202] Shartel's position that courts should be barred from wading into issues of "fact" contrasts with the more moderate position taken by Strode in

194. *Id.*
195. *Id.*
196. *Id.* at 301.
197. *Id.*
198. LOMBARDO, *supra* note 12, at 112 (noting Strode facilitated the passage of the sterilization law and led efforts to test the constitutionality of the statute in Virginia courts).
199. *See supra* Section I.A (discussing academic literature surrounding sterilization); *infra* Section IV.A (discussing law review publications on this subject).
200. Burke Shartel, *Sterilization of Mental Defectives*, 24 MICH. L. REV. 1, 21 (1925) [hereinafter Shartel, MICH. L. REV.]. This article was reprinted the following year. Burke Shartel, *Sterilization of Mental Defectives*, 16 J. CRIM. L. & CRIMINOLOGY 537 (1926).
201. Smith v. Command, 204 N.W. 140, 141 (1925).
202. Shartel, MICH. L. REV., *supra* note 200, at 21.

the *Virginia Law Review* that a sterilization statute should be upheld if found to be a "reasonable exercise" of police power.[203] Under Shartel's theory, the cost-benefit analysis employed by legislatures could not be subject to judicial intervention and courts could only overturn a statute if the plaintiff demonstrated that the findings of the legislature were wrong "beyond a reasonable doubt."[204]

Shartel, like many other writers in the 1920s, saw a cost-benefit analysis as an essential part of sustaining a forced sterilization statute. He minimized the problem—for instance, at one point he wrote that though there were 20,000 "feeble-minded" persons in the state, "[t]his would not be too many to sterilize, considering the population as a whole . . . ."[205] Then, following the lead of the Michigan Supreme Court, Shartel suggested that the issue involved calculating society's need:

> If the social need be great enough the state can deprive of liberty (as it does do with the insane, the criminal, the man who objects to vaccination and so on) or it may take life (as it does as a penalty for crime or by drafting into the military service and exposing to death, etc.).[206]

This cost-benefit analysis allowed little room for humanity. However, this cold calculus served as one of the primary justifications for the approval of state-sponsored sterilization in the Supreme Court.

C. The United States Supreme Court Approves Sterilization

In *Buck*, the United States Supreme Court leveraged *Smith*'s methodological calculus when it decided that sterilization programs violated neither the Equal Protection Clause nor the Due Process Clause of the Fourteenth Amendment.[207] The Court hardly considered the fact that the Virginia law applied differently to people who were institutionalized, stating "the law does all that is needed when it does all that it can, indicates a policy, applies it to all within

203. *Compare id.* (concluding that courts should assume that the legislature acted on accurate facts with respect to medical science in eugenics challenges), *with* Strode, *supra* note 190, at 301 (raising doubts as to whether the judicial determination of feeble-mindedness under the Virginia statute "involve[d] an unreasonable classification"); R.S.L., Note, *Constitutional Law—Eugenical Sterilization Statutes*, 12 VA. L. REV. 419, 420 (1926) (arguing that courts should defer to the judgment of the respective legislature in concluding whether or not an exercise of the police power is reasonable).

204. Shartel, MICH. L. REV., *supra* note 200, at 21.

205. *Id.* at 5.

206. *Id.* at 18.

207. Buck v. Bell, 274 U.S. 200, 205, 208 (1927).

the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow."[208]

On the question of due process, the Court nodded to the notion that a government action could comply with procedural due process and yet still violate an individual's substantive rights: "The attack is not upon the procedure but upon the substantive law. It seems to be contended that in no circumstances could such an order be justified."[209] However, Justice Holmes quickly disposed of such a notion, finding that if the grounds for conducting a sterilization exist, then "they justify the result."[210] In contrast to the Supreme Court of Virginia, which had leaned on deference to the legislature in its reasoning, the United States Supreme Court declared outright the importance of the State's interests over those of the individual.[211] Justice Holmes emphasized that the rights of an individual to procreate must be subordinated to the concerns of the State, juxtaposing the "lesser sacrifice" of not being able to have children with the all-consuming sacrifice of giving one's life through the military draft.[212] He pointed out that,

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.[213]

This opinion propelled the cost-benefit analysis to new heights. Instead of weighing the benefits to society of being free from feeble-minded offspring against the cost of depriving a person of the right to procreate, the Supreme Court weighed the benefits of protecting national security against the costs of life. Recasting eugenics in this patriotic, military context, the cost seemed small and the benefits quite large. And so, the Supreme Court, after dismissing concerns

208. *Id.* at 208.
209. *Id.* at 207.
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.* (citing Jacobson v. Massachusetts, 197 U.S. 11, 38–39 (1905)).

raised in the earlier part of the twentieth century,[214] ultimately embraced eugenics as valid, even socially beneficial, government action. Following the lead of the Court in *Buck v. Bell*, the state courts would soon follow suit.

III. THE JUDICIAL ACCEPTANCE OF STERILIZATION, 1927–1930S

In the wake of *Buck v. Bell*, state legislatures and courts took their cue from the Supreme Court and began upholding sterilization legislation more routinely. An *American Law Reports* article on sterilization observed the central importance of the case: "Since the decision of *Buck v. Bell* . . . upholding the Virginia statute involved in that case . . . judicial opinion has inclined in favor of the constitutionality of such statutes, which, up to the time . . . had more frequently been declared unconstitutional than upheld."[215] However, sterilization legislation was still subject to certain procedural limitations. For instance, the 1927 North Carolina sterilization legislation, which had no provision for hearings, was struck down in 1933 in *Brewer v. Valk*.[216] Meanwhile, other courts upheld statutes similar to Virginia's in *Buck*.[217]

This tension between *Buck*'s insistence that sterilization violated no substantive rights and the concerns for process appear throughout the case law of the post-*Buck* era. After *Buck*, sterilization in and of itself was not considered a federal constitutional violation, but challenges to sterilization laws in state courts continued nonetheless.[218] While *Buck* minimized an individual's liberty interest in having children by contrasting it with national security interests, state courts diminished this liberty interest even further. Likewise, *Buck*'s statement that sterilization laws are "not penal" meant that courts consistently construed these statutes, even when they applied only to convicted criminals, as wholly separate from the criminal system—and accordingly, separate from the Constitution's ban on cruel and unusual punishment.[219] On the other hand, state courts that

214. *See supra* Section I.C (discussing early constitutional challenges to state sterilization statutes).

215. E.W.H., *Asexualization or Sterilization of Criminals or Defectives*, 87 AM. L. REP. 242, 242–43 (1933).

216. 204 N.C. 186, 192, 167 S.E. 638, 641 (N.C. 1933).

217. *See, e.g.*, State v. Troutman, 299 P. 668, 670 (Idaho 1931); State v. Schaffer, 270 P. 604, 605 (Kan. 1928).

218. *See, e.g.*, *Schaffer*, 270 P. 604, 604 (Kan. 1928). *See generally* E.W.H., *supra* note 215 (summarizing challenges to state sterilization laws following *Buck v. Bell*).

219. *See, e.g.*, Skinner v. State *ex rel.* Williamson, 115 P.2d 123, 126 (Okla. 1941), *rev'd*, 316 U.S. 535 (1942); *In re* Clayton, 234 N.W. 630, 632 (Neb. 1931).

may have been uncomfortable following the liberty argument of *Buck* protected individuals by requiring more process.[220]

A. Expansion of Buck *in Substantive Terms*

Buck eliminated the equal protection argument as a rationale for striking state sterilization laws, facilitating the blanket approval of sterilization programs at the state level. The first place where the power of the *Buck* decision became patently apparent was in Kansas. In *State v. Schaffer*,[221] the State asked the court to compel a surgeon at Topeka State Hospital to perform sterilizations required by state law.[222] Unlike most cases where a prisoner contested his own sterilization, this case was about a doctor exercising his right not to perform a surgery with which he had a moral disagreement.[223] This distinction suggests that dissent existed in the medical community.

Relying on *Buck*'s assertion that sterilization was a matter of public health, the *Schaffer* court framed the issue of individual liberty not as it related to the state's police power, but as the state's choice between promoting reproduction and promoting survival:

> Reducing this problem of reconciliation of personal liberty and governmental restraint to its lowest biological terms, the two functions indispensable to the continued existence of human life are nutrition and reproduction. Without nutrition, the individual dies; without reproduction, the race dies. Procreation of defective and feeble-minded children with criminal tendencies does not advantage, but patently disadvantages, the race. Reproduction turns adversary and thwarts the ultimate end and purpose of reproduction. The race may insure its own perpetuation and such progeny may be prevented in the interest of the higher general welfare.[224]

For the Kansas Supreme Court, the question was not about the extent to which the state can infringe on an individual's liberty. The question was about the state's own balancing decisions and the "health" of the race as a whole, removing the individual's liberty interest from the discussion.

Thus, by the time the Idaho Supreme Court was deciding the constitutionality of sterilization three years later, the equal protection

220. *See, e.g.*, *In re* Opinion of the Justices, 162 So. 123, 128 (Ala. 1935); Davis v. Walton, 276 P. 921, 924 (Utah 1929).

221. 270 P. 604 (Kan. 1928).

222. *Id.* at 604.

223. *Id.*

224. *Id.* at 605.

question had become almost routine. In *State v. Troutman*,[225] the Idaho Supreme Court quickly eliminated each constitutional objection to the state sterilization statute.[226] The *Troutman* court noted that an individual liberty interest may not even exist for the feeble-minded.[227] And similarly, in *In re Main*,[228] the Supreme Court of Oklahoma simply noted that Oklahoma's law was substantively identical to the Virginia law in *Buck*, and that the interest of the public good overcame any liberty interest an individual might have.[229] In sum, in the ten years following *Buck*, state courts expanded upon the notion that legislation could treat institutionalized and non-institutionalized citizens differently to encompass the idea that institutionalized people may not even have a right to reproduction in the first place.

Despite the fact that *Buck*'s holding upheld sterilization on equal protection and due process grounds, its language also led state courts to reject arguments that sterilization constituted cruel and unusual punishment.[230] For instance, in 1931 the Nebraska Supreme Court used this precedent to dismiss a cruel and unusual punishment argument.[231] The court explained that a vasectomy was a relatively minor operation because it is a relatively short procedure that is not dangerous to the individual's health and does not remove the individual's sexual desire or ability to engage in sexual activity.[232] Coupling *Buck*'s finding that sterilization is inherently not penal with the simplicity of the operation, the Nebraska court was able to avoid the cruel and unusual punishment argument altogether. Once the gentleness of the operation had been cast in this light, the Nebraska court could avoid questions about the infringement of individual liberty and easily liken the operation to immunizations.[233]

225. 299 P. 668 (Idaho 1931).

226. *Id.* at 669–71.

227. *Id.* at 670 ("If there be any natural right for natively mental defectives to beget children, that right must give way to the police power of the state in protecting the common welfare, so far as it can be protected, against this hereditary type of feeble-mindedness.").

228. 19 P.2d 153 (Okla. 1933).

229. *Id.* at 154–56 ("[Even] assuming that the right to beget children is a natural and constitutional right . . . this right cannot be extended beyond the common welfare.").

230. *See* Buck v. Bell, 130 S.E. 516, 519 (Va. 1925) ("The act is not a penal statute. The purpose of the Legislature was not to punish but to protect the class of socially inadequate citizens named therein from themselves, and to promote the welfare of society by mitigating race degeneracy and raising the average standard of intelligence of the people of the state.").

231. *In re* Clayton, 234 N.W. 630, 632 (Neb. 1931).

232. *Id.*

233. *Id.*

Ten years later (and fifteen years after *Buck*), the Supreme Court of Oklahoma used a similar logic to justify upholding the state's sterilization statute in *Skinner*.[234] In Oklahoma, the sterilization law at issue only applied to convicted criminals, making the contention that the law was not "penal" more problematic. The Supreme Court of Oklahoma recognized that it had a choice: construe the statute as penal, and therefore unconstitutional, or construe the statute as the promotion of public health akin to vaccinations, and therefore valid.[235] The court decided to "assume" the legislative intent was to prevent procreation of people who would then become criminals in order to avoid invalidating the law.[236] It was *Buck* that gave courts the ability to circumvent the difficult issues raised by forcibly removing an individual's ability to have children.

B. Imposing Procedure on Eugenics Programs

The first state to take a stand against sterilization laws on procedural grounds was Utah in 1929. In *Davis v. Walton*,[237] the Utah Supreme Court held that the state failed to show that Davis was "the probable potential parent of socially inadequate offspring likewise afflicted," as required by law.[238] A prison guard alleged he had caught the inmate committing sodomy with another inmate, although the other inmate denied this allegation.[239] On its face, the finding is simply an application of basic principles—the State did not prove the elements required for the sterilization statute to attach. But the court stepped further in criticizing the State. The court noted that the operation would not help the inmate overcome his "abnormal sexual desire."[240] Furthermore, the sterilization order did not specify which of the three operation types was ordered (vasectomy, cutting the nerves, or castration), and so the cruelty of the act could not be assessed.[241] The Utah court critiqued the practice of sterilization by discussing the potential cruelty of the operation itself and the retributive nature of the State's decision to sterilize a homosexual, who had no chance of procreating with another man anyway.[242]

234. State *ex rel.* Williamson, 115 P.2d 123, 126 (Okla. 1941).
235. *Id.*
236. *Id.* at 127.
237. 276 P. 921 (Utah 1929).
238. *Id.* at 922.
239. *Id.* at 924.
240. *Id.* at 925.
241. *Id.* at 924.
242. *Id.* at 924–25.

In 1935, the Supreme Court of Alabama also found procedural problems with its state sterilization statute.[243] In contrast to other cases, this case was a certified question from the governor, implying that the Governor took issue with the legislative enactment in the first place, and thereby making the court's position politically easier.[244] The court first distinguished the Alabama law from the Virginia law upheld in *Buck* by pointing out that the Alabama legislation denied a right to appeal *de novo* in a court.[245] The Supreme Court of Alabama then set out several procedural problems with the legislation related to the lack of notice and opportunity to be heard.[246] In making its procedural due process argument, the court articulated why process was so important, thereby hinting at the substantive issue:

> We think that the sterilization of a person is such an injury to the person as is contemplated by the quoted provision—just as much so as to deprive him of any other faculty, sense, or limb—and that due process of law means that this cannot be done without a hearing on notice before a duly constituted tribunal or board, and, if this is not a court, then with the untrammeled right of appeal to a court for a judicial review from the finding of the board or commission adjudging him a fit subject for sterilization.[247]

Even with this articulation of the importance of the right to have children, the Supreme Court of Alabama provided guidance to the legislature for creating a valid sterilization statute. Sterilization is an appropriate use of the police power so long as (1) status determination is constitutionally ascertained, and (2) the procedure is not cruel and unusual punishment.[248]

And then, over fifteen years after *Buck*, the Washington Supreme Court in *In re Hendrickson*,[249] struck down another sterilization statute on procedural grounds in 1942, only months before the Supreme Court struck down Oklahoma's sterilization law in *Skinner*.[250] The Washington court challenged the way the state provided notice to confined people facing sterilization.[251] The law

243. *In re* Opinion of the Justices, 162 So. 123, 128 (Ala. 1935).
244. *See id.* at 124.
245. *Id.* at 128.
246. *Id.*
247. *Id.*
248. *Id.*
249. 123 P.2d 322 (Wash. 1942).
250. *Id.* at 357 (decided on March 5, 1942); *see* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 535 (1942) (decided on June 1, 1942).
251. In re *Hendrickson*, 123 P.2d. at 325–26.

required that the state simply give notice to the feeble-minded person, which the court contested because by definition that person would not likely understand the procedure against him.[252] The law provided notice to the insane differently than the feeble-minded: the state was to provide notice to the guardian, or the next of kin, but if neither of those existed, to the superintendent of the facility.[253] The court took issue with this latter provision as well, because the superintendent of the facility was the same person who would be recommending the sterilization.[254]

The *Hendrickson* court's desire to strike down the sterilization statute was apparent, because neither of these procedural provisions applied to Hendrickson himself, since notice was provided to Hendrickson's next of kin—in this case, his father.[255] The Washington court twisted itself around to strike down the whole of the statute, holding that because the law was primarily designed to limit procreation by the feeble-minded, the provisions applying to the insane like Hendrickson would not have been enacted without the unconstitutional provision for the feeble-minded.[256] As the dissent pointed out, the court's reasoning is somewhat unjustified because if the legislature had known that parts of the law inapplicable to a person at bar were unconstitutional, those portions would have been omitted in the first place.[257]

In sum, process became the framework through which courts could discuss the importance of the right infringed upon by sterilization laws. Courts used these procedural constraints to keep the eugenics movement in check in some states. But this reliance on process to invalidate eugenics laws led to an increase in process—increased procedure resulted in a mechanized, normalized process for

252. *Id.*; Act of Mar. 8, 1921, ch. 53, sec. 4, 1921 Wash. Sess. Laws 162, 164 ("prevent[ing] the procreation of feeble minded, insane, epileptic, habitual criminals, moral degenerates, and sexual perverts, who may be inmates of institutions maintained by the state"), *invalidated by In re* Hendrickson, 123 P.2d 322 (Wash. 1942).

253. In re *Hendrickson*, 123 P.2d at 325; Act of Mar. 8, 1921, ch. 53, sec. 4, 1921 Wash. Sess. Laws at164.

254. In re *Hendrickson*, 123 P.2d at 326 ("Such a situation is contrary to the spirit of our laws and institutions. It is beyond the capacity of human nature for one individual to act fairly, in practical effect, as jailer, prosecutor, judge, and executioner and, at the same time, as guardian or next friend of the insane accused. The statute places a superintendent in an impossible position however fair minded and conscientious he may be. As a practical matter, it does not afford the inmate the kind of notice and opportunity to appear and defend guaranteed by the due process clause.").

255. *Id.* at 324.

256. *Id.* at 327.

257. *Id.* at 328 (Steinert, J., concurring in part and dissenting in part).

sterilizing people. The North Carolina experience exemplifies how the judicial focus on heightened procedure worked to embed a routinized eugenics program in the state, with little room for victims to question what was happening to them.[258] Despite the mechanization of the sterilization process, courts at least attempted to protect the rights of plaintiffs by heightening procedural requirements. In other areas of the legal profession, especially with some practicing lawyers and academics, questions about the legality and morality of sterilization emerged. The law was on the side of sterilization, but rumbles of dissent were growing.

IV. THE REJECTION OF STERILIZATION, 1930S–1942

A. Gauging Lawyers' Attitudes Towards Eugenics in the 1930s

There were other voices calling for reason, too. Clarence Ruddy, a member of the class of 1927 at Notre Dame Law School and the first editor-in-chief of the *Notre Dame Lawyer* (what became the *Notre Dame Law Review*)[259] provided probably the strongest case against sterilization in a law review during the entire decade of the 1920s.[260] Ruddy framed the issue of sterilization as one of many infringements on individual freedom and constitutional rights and stated that "[t]he most dramatic means so far adopted for the extinction of the individual is sterilization."[261] He based his case against sterilization largely on religious doctrine that taught the dignity of humans and the limitations that the state could impose on religion.[262] It was a passionate plea, but one that was not heeded. A year earlier, a young, radical lawyer from New York City, Jacob Broches Aronoff, wrote in the *St. John's Law Review* about the reasons for public opposition to eugenics legislation.[263] Born in 1896 in Russia, Aronoff was a 1918 graduate of Columbia College, where

258. *See infra* Section V.B. (discussing North Carolina's sterilization regime).

259. *See* Clarence J. Ruddy, *Birth of the Notre Dame Lawyer*,52 NOTRE DAME LAW. 589, 589 (1977) (discussing the founding of the *Notre Dame Lawyer*); *History*, Notre Dame Law Review, http://ndlawreview.org/about/history/ [http://perma.cc/VD2X-5C5U] (noting the name change took place in 1981).

260. *See generally* Clarence J. Ruddy, Note, *Compulsory Sterilization: An Unwarranted Extension of the Powers of Government*, 3 NOTRE DAME LAW. 1 (1927) (making the fundamental argument that the government should not have the power to sterilize any citizen).

261. *Id.* at 2.

262. *Id.* at 15–16.

263. Jacob Broches Aronoff, *The Constitutionality of Asexualization Legislation in the United States*, 1 ST. JOHN'S L. REV. 146, 146–47 (1926).

he was a member of the Intercollegiate Socialist Club, and a 1923 graduate of Fordham University School of Law.[264] In the early 1930s, Aronoff supported union workers with several articles in the popular press,[265] in addition to his work as a lawyer.[266] From his standpoint, the system "look[ed] like a heartless method on the part of the tax-paying classes of getting rid of a duty of caring for the helpless and unfortunate of the poorer strata of society . . . ."[267] Despite those vigorous protests against sterilization, the tendency was going in the other direction.

Perhaps one of the most pernicious aspects of *Buck v. Bell* was its legitimation of sterilization. The year 1930 saw discussion of yet another book endorsing eugenics based on both its potential to preserve and improve the white race, E.S. Gosney and Paul Popenoe's *Sterilization for Human Betterment*.[268] It discussed California's supposed success with sterilization.[269] Gosney and Popenoe's handbook included an address by Otis H. Castle at the ABA's annual meeting in 1928.[270] Castle, a Los Angeles lawyer,[271] was also a board member of the Human Betterment League[272] and sometimes a lecturer at the University of Southern California's School of Law.[273]

One underutilized method of gauging the legal profession's attitudes towards sterilization involves reading their literary output.[274] To that end, several prominent legal commentators lent their support to the eugenics movement as advanced by Gosney and Popenoe.

264. Email from Frank Aronoff to Alfred Brophy, Professor of Law, Univ. of N.C. Sch. of Law (May 13, 2016, 2:38 AM EST) (on file with the *North Carolina Law Review*).

265. *See, e.g.*, Sterling D. Spero & Jacob Broches Aronoff, *War in the Kentucky Mountains*, AM. MERCURY, Feb. 1932, at 226–33; Sterling D. Spero & Jacob Broches Aronoff, *A Business Men's Strike*, NEW REPUBLIC, Jan. 20, 1932, at 262.

266. Email from Frank Aronoff to Alfred Brophy, *supra* note 264 (mentioning that Jacob Aronoff worked as a lawyer for Simplicity Patterns).

267. Aronoff, *supra* note 263, at 147.

268. *See supra* notes 48–53 and accompanying text.

269. GOSNEY & POPENOE, *supra* note 48, at xiii–xiv.

270. Otis H. Castle, *The Law and Human Sterilization*, *in* GOSNEY & POPENOE, *supra* note 48, at 156–77.

271. Otis. H. Castle, *Legal Phases of Co-Operative Buildings*, 2 S. CAL. L. REV. 1, 1 n.* (1928).

272. GOSNEY & POPENOE, *supra* note 48, at 194 (listing board members of the Human Betterment League).

273. Castle, *supra* note 271, at 1 n.*.

274. *See* Alfred Brophy, *Gauging Attitudes from Law Reviews: The Case of Sterilization*, FAC. LOUNGE (Mar. 28, 2012), http://www.thefacultylounge.org/2012/03/gauging-public-attitudes-from-law-reviews-the-case-of-sterilization.html [https://perma.cc/PV3N-WTMU] (reviewing various law review articles and book reviews regarding eugenics).

William Renwick Riddell, a judge on the Ontario, Canada, appellate bench and a prolific historian,[275] reviewed *Sterilization for Human Betterment* in the *ABA Journal* in 1930.[276] He invoked *Buck* and then added that "the appalling prevalence of imbecility and the consequent drain upon the resources of the people have impelled many to consider sterilization of the imbecile as called for . . . ."[277] Riddell concluded, "other jurisdictions may well profit by the example of California."[278] Similarly, University of Illinois Sociology Professor Donald Taft's review of *Sterilization for Human Betterment* in the *Illinois Law Review* concluded, "[s]terilization will eliminate many socially dangerous homes. If, as is quite probable, a race somewhat sounder eugenically also results, we can all rejoice."[279]

Even though courts routinely upheld sterilization legislation in the 1930s, others in the legal profession expressed reservations about such legislation. Law review articles in the 1930s reveal lawyers' skepticism of eugenics.[280] The *Yale Law Journal* offered a mild critique in its review of Gosney and Popenoe, asking for a more extensive review of the scientific evidence in support of sterilization.[281] The *Harvard Law Review*'s even shorter review of *Sterilization for Human Betterment* concluded by noting that the imminence of eugenic legislation was "disturbing."[282] While these were not strong criticisms by any means, they demonstrated concern about what was coming.

Further, some law review articles advanced an alternative vision with stronger skepticism towards this movement. Such skepticism appeared in reviews of City University of New York Professor Jacob Henry Landman's 1932 book *Human Sterilization*.[283] Landman was

275. *See* William Renwick Riddell, CANADIAN ENCYLCOPEDIA, (June 13, 2016, 12:43 AM), http://www.thecanadianencyclopedia.ca/en/article/william-renwick-riddell/ [https://perma.cc/RS4E-2GKY].

276. William Renwick Riddell, Book Review, 16 A.B.A. J. 253, 253 (1930).

277. *Id.* at 253.

278. *Id.*

279. Donald R. Taft, Book Review, 24 ILL. L. REV. 944, 947 (1930).

280. *See id.* at 946 (reviewing authors who were skeptical of sterilization).

281. Arthur B. Dayton, Book Review, 39 YALE L.J. 596, 597 (1930) (stating his desire "for an open, fact-finding mind on the whole problem of heredity, birth control, and sterilization as applied to eugenics").

282. Book Review, 43 HARV. L. REV. 160, 161–62 (1929) (reviewing GOSNEY & POPENOE, *supra* note 48).

283. J. H. LANDMAN, HUMAN STERILIZATION: THE HISTORY OF THE SEXUAL STERILIZATION MOVEMENT 4 (1932) [hereinafter LANDMAN, HUMAN STERILIZATION]. For instance, Landman referred to the "alarmist eugenics." *Id.* He also discussed legal problems with sterilization—and some ways to overcome them. *Id.* at 269–84. Landman identified that public opinion was in favor of eugenics. *See id.* at 120. These observations

cautious about sterilization and his reviewers frequently extended his criticisms. For example, George S. Roche's review in the *California Law Review* argued that Landman failed to engage fully with the moral qualms about sterilization.[284] Roche, whose other work presented a sympathetic case for temporary housing for itinerant workers in California,[285] wrote that "the author does not always recognize the Devil in disguise."[286] Another review of Landman that appeared in the *Southern California Law Review*, written by a law student, ridiculed the underlying justification for sterilization by drawing attention to the logical extreme of the eugenics movement: the outright extermination of the "unfit."[287]

Despite some important critiques of eugenics in law reviews, other articles supported sterilization. In addition to the early articles by Aubrey Stode and Burke Shartel that supported sterilization before *Buck v. Bell*, law reviews supported sterilization into the 1930s. During the 1934–1935 school year, the *Kentucky Law Journal* published two pieces supporting sterilization. The first was a student work.[288] The second was an article by University of Kentucky Anthropology Professor and Dean of the graduate school W.D. Funkhouser.[289] Dean Funkhouser concluded his article:

added to Landman's earlier article. *See* J. H. Landman, *The History of Human Sterilization in the United States—Theory, Statute, Adjudication*, 23 ILL. L. REV. 463, 464, 466 (1929) [hereinafter Landman, *The History of Human Sterilization in the United States*] (noting that eugenics was considered by the Court after "decades of active propaganda" and that eugenics enthusiasts' "inexcusable error" came by confusing causation with correlation).

284. George S. Roche, Book Review, 22 CAL. L. REV. 129, 130 (1933).

285. George S. Roche, *California's Labor Camps For Itinerant Unemployed*, 22 NAT'L MUN. REV. 133, 133 (1933).

286. Roche, *supra* note 284, at 130. Several other reviews critiqued Landman in other ways to suggest that sterilization was overused. *See* Sidney S. Grant, Book Review, 12 B.U. L. REV. 749, 750 (1932) (recognizing the potential value of eugenics but expressing concerns about its administration); LeRoy M. A. Maeder, Book Review, 81 U. PENN. L. REV. 653, 654 (1932) (arguing that Landman's dissatisfaction with psychological and psychiatric classifications for feebleminded people compels overly simplistic definitive classifications).

287. Ernestine Tinsley, Book Note, 6 S. CAL. L. REV. 351, 353 (1932). In this unusual review, the author of the review, law student Ernestine Tinsley, first mockingly quoted Nietzche's famous line "[b]ehold, I teach you the superman," before going on to make the more outrageous suggestion that the "unfit" be exterminated. *Id.* at 351 (quoting F. NIETZSCHE, THUS SPOKE ZARATHUSTRA 13 (Boni & Liveright eds., Thomas Common trans. 1917) (1883)).

288. George T. Skinner, Note, *A Sterilization Statute for Kentucky*, 23 KY. L.J. 168, 168 (1934) (noting that the best way to reduce society's "misery resulting from insanity" is through a "harmless surgical operation, namely sterilization").

289. W.D. Funkhouser, *Eugenical Sterilization*, 23 KY. L.J. 511, 516 (1935). Though Funkhouser cites 1899 as the first legal adoption of sterilization, 1899 refers to the date

> In those states where consistent and regular use of the measure has been followed, since it was first legally adopted in 1899, the results are startling even after one generation. No new patients are appearing to fill the slowly decreasing ranks in the asylums and hospitals except those who come from other states. This decrease will of course be greater with each succeeding generation. In fact it is claimed that if sterilization laws could be enforced in the whole United States, less than four generations would eliminate nine-tenths of the feeble-mindedness, insanity and crime of the country.[290]

Even though some lawyers and students took to the pages of law reviews to ridicule eugenics or make the case against it, public attitudes—as reflected in legislation—continued to favor sterilization. Sterilization legislation swept through state legislatures in the 1920s and 1930s.[291] LeRoy Maeder's review of Landman's book in the *University of Pennsylvania Law Review* begins with the recognition of the popularity of sterilization:

> The voluminous literature on human sterilization which has appeared in recent years has been for the most part definitely biased in favor of this procedure and has served to influence a considerable group of people to believe that in the general employment of this method as a compulsory eugenic measure will bring about a substantial reduction in the number of the socially inadequate, especially the feebleminded. The enthusiasts have succeeded so well in their propaganda that even sober-minded persons have urged the adoption of broad human sterilization legislation as a means of coping with the mentally disordered and deficient, and of reducing the burden of state appropriations to public institutions supporting them.[292]

This survey of law reviews demonstrates that even as the state courts were falling in line behind the Supreme Court's decision in *Buck v. Bell*, there was some opposition to eugenics in the legal community. That is, legal scholars at the time understood that sterilization

when sterilizations commenced in Indiana. *Id.* at 516. The first law supporting sterilization was in 1907. ALEXANDRA MINNA STERN, EUGENIC NATION: FAULTS AND FRONTIERS OF BETTER BREEDING IN MODERN AMERICA 5, 99 (2d ed. 2016); *Eugenic Sterilization in Indiana*, 38 IND. L.J. 275, 276 (1963).

290. Funkhouser, *supra* note 289, at 516. A brief review of Landman in the *Idaho Law Journal* was to the same effect. Book Review, 3 IDAHO L.J. 103, 105 (1933) (reviewing LANDMAN, HUMAN STERILIZATION, *supra* note 283 and noting the "satisfactory" results of sterilization and its minimal impact on patients' lives).

291. *See, e.g.*, F.C.N., *supra* note 96, at 617 (reviewing states' adoption of sterilization statutes).

292. Maeder, *supra* note 286, at 653.

implicated significant moral problems, the economic justification for it being one of the most significant. However, from *Buck v. Bell* through the late 1930s, the weight of public opinion and legal authority remained in favor of sterilization.[293]

B. Skinner v. Oklahoma*: Recognizing a Fundamental Right*

Fifteen years after *Buck* in 1942, the Supreme Court struck down a sterilization law in *Skinner v. Oklahoma*.[294] *Skinner* is remembered for its importance in the larger movement towards fundamental rights and the expansion of substantive due process in the 1950s and 1960s.[295] The case represents a culmination of previous efforts to highlight the fundamental rights of procreation and outlines a distinction between rational basis review and strict scrutiny.[296] But within the context of the eugenics movement, it is important to remember that *Skinner* carved out a way for *Buck v. Bell* to continue to govern many state sterilization programs.

The Supreme Court held that the Oklahoma sterilization statute violated the equal protection clause because it exempted certain criminal activity from compulsory sterilization.[297] The Oklahoma law required that people who had been convicted of more than two felonies were to be sterilized if doing so would not injure the individual.[298] Exempt felonies included embezzlement, but not theft. So, Skinner, who had stolen chickens and committed armed robbery twice, would be sterilized, but a person who stole funds from his company (essentially the same act) would not.[299] In drawing this distinction, the court elaborated on the heightened scrutiny that the equal protection clause requires for laws that infringe on a fundamental right.[300]

However, the Supreme Court specifically noted that it was not overturning *Buck*, thereby allowing many state sterilization statutes to remain intact after *Skinner*.[301] *Buck* had a "saving feature" that

293. *See* Brophy, *supra* note 274; COHEN, *supra* note 3, at 2–6.
294. 316 U.S. 535, 541–42 (1942).
295. NOURSE, *supra* note 13, at 15–16.
296. *Skinner*, 316 U.S. at 541–42; *see* NOURSE, *supra* note 13, at 164–65 (discussing competing interpretations of *Skinner*).
297. *Id.* at 541.
298. *Id.* at 541–42.
299. *Id.*
300. *Id.*
301. *Id.* at 540.

Skinner did not: it treated all institutionalized people the same.[302] Following sterilization under *Buck*, institutionalized people might be permitted to reside in their community.[303] That is, if the legislature's classification was between institutionalized and non-institutionalized feeble-minded people, and sterilization would allow more people to avoid institutionalization, then the equal protection clause was satisfied.[304] On the other hand, the statute in *Skinner* treated some felons differently from others.[305] It sterilized those convicted three times of grand larceny while it did not sterilize those convicted three times of embezzlement.[306] For that reason, states could continue to sterilize the feeble-minded and insane without running into major equal protection hurdles.

With the Supreme Court's validation of sterilization in *Buck*, the question of whether sterilization violated fundamental rights would have to await the development of the substantive due process doctrine. The judiciary had wavered on recognizing a fundamental human right to have children. But as the law developed, procedural focus gave way to a cost-benefit calculation—one that ultimately subordinated these potential rights to the interests of the state. In this sense, the legal justification for sterilization was rooted in the interest of the government.

As often is the case in American law, the march towards liberty was accompanied by an expansion in the value we attached to individuals.[307] Whereas before World War II, eugenicists emphasized the costs to society and minimized the interests of the people who had children; after the war, that rhetoric was more circumscribed and an understanding of the value of autonomy over reproductive decisions ultimately emerged. However, in spite of these changing social and legal norms, state-sponsored sterilization programs persisted in several parts of the country, including North Carolina.[308] Against this

302. *Id.* at 541 ("Marriage and procreation are fundamental to the very existence and survival of the race . . . . Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.").

303. *Id.* at 541–42.

304. *Id.* at 540–41.

305. *Id.* at 541–42.

306. *Id.*

307. *See* Carl Brent Swisher, *The Delineation of Personal and Civil Rights*, 44 GEO. L.J. 395, 396 (1956) (noting the newfound emphasis on individual rights within the Supreme Court).

308. *See* Begos, *supra* note 28 (noting persistence and expansion of sterilization program in North Carolina following World War II).

backdrop, we now turn to an analysis of North Carolina's experience with sterilization.

V. THE NORTH CAROLINA MINDSET

All three branches of state government weighed in on North Carolina's eugenics program. The original non-criminal sterilization law, which the legislature passed in 1929, was revised after the courts raised concerns about whether it afforded individuals adequate procedural protections.[309] The new law, passed in 1933, did have procedural safeguards, which the executive branch then used to develop a systematic practice for identifying candidates for sterilization.[310] Although the use of sterilization began to wane in the 1960s, the legislature revised the law in 1974 and it faced another court challenge.[311] Even in the wake of *Roe v. Wade* and the revolution of reproductive rights, however, the Supreme Court of North Carolina upheld sterilization in 1976—and the legacy of this long-lasting state-sponsored program continues to cast a dark shadow over both the individuals affected and the state's jurisprudence.[312]

A. The 1929 Sterilization Law and the Court's Procedural Objections

The North Carolina General Assembly enacted its first sterilization statute in 1919, authorizing sterilizations for the health and well-being of prison inmates.[313] In 1929, two years after *Buck v. Bell*, North Carolina passed its first sterilization statute that applied outside the prison context.[314] The statute provided that:

> It shall be the duty of the board of commissioners of any county of North Carolina, at the public cost and expense, to have the operation performed upon any mentally defective or feeble-minded resident of the county, not an inmate of any public institution, upon the petition and request of the next kin or legal guardian of such mentally defective person . . . .[315]

309. Act of Feb. 18, 1929, ch. 34, sec. 2, 1929 N.C. Sess. Laws 28, 28 (1929), *invalidated by* Brewer v. Valk, 204 N.C. 186, 167 S.E. 638 (1933); *see infra* Section V.A.

310. Act of Apr. 5, 1933, ch. 224, 1933 N.C. Sess. Laws 345 (repealed 2003); *see infra* Section V.B.

311. Act of Apr. 11, 1974, ch. 1281, sec. 1, 1973 N.C. Sess. Laws 458, 458–461 (repealed 2003); *see infra* Section V.C.

312. *In re* Moore, 289 N.C. 96, 104–05, 221 S.E.2d at 313; *see infra* Section V.D.

313. Act of Mar. 11, 1919, ch. 281, sec. 1–2, 1919 N.C. Sess. Laws 504, 504 (1919) (repealed 1929).

314. Act of Feb. 18, 1929, ch. 34, sec. 2, 1929 N.C. Sess. Laws 28, 28 (1929), *invalidated by* Brewer v. Valk, 204 N.C. 186, 167 S.E. 638 (1933).

315. *Id.*

The Supreme Court of North Carolina struck down the law for lack of procedural due process in *Brewer v. Valk*, since *Buck* had specifically emphasized the importance of both notice and a hearing.[316] The court's holding turned explicitly on the need for notice and hearing in matters that involve right to be free from physical harm.[317]

Despite the court's recognition of human rights involved in involuntary sterilization, *Brewer* focused on the benefits of sterilization, both to society and to the individual.[318] The Supreme Court of North Carolina took *Buck* one-step further by lauding the benefits of sterilization for the individual. Instead of focusing on the savings eugenics offers for the state, as *Buck* did, *Brewer* portrayed the state as helping a poor woman stop herself from having more children.[319] In *Brewer*, the Supreme Court of North Carolina gave clear directions on how to fix the sterilization statute, while at the same time recognizing that a procedurally compliant eugenics program would have social benefits.[320] The legislature needed only to provide notice and opportunity to be heard, paralleling the provisions of the statute in neighboring Virginia, and the revision would be upheld. Process, not whether or not the individual had a fundamental right to have children, became the focus of the legislature in redrafting the law and the executive branch in administering the law.

B. The Revised 1933 Sterilization Act

The revised 1933 North Carolina Act provided some additional—but not many—procedural protections for those who would be sterilized, grounding the justification in what it claimed was the best interest of the patient or the public good.[321] For those who were institutionalized, the proceedings before the Eugenics Board were initiated by written petition of the "prosecutor,"[322] who was generally the superintendent of any "penal or charitable" institution supported by the state.[323] The petition needed to contain the medical history of the person to be sterilized and particular reasons why

316. *Brewer*, 204 N.C. at 190–91, 167 S.E. at 640.
317. *Id.* at 191, 176 S.E. at 640.
318. *Id.* ("In property rights due process requires a forum with notice and a hearing. It goes without saying that the same must apply to human rights. If the Constitution and laws in relation to due process-notice and hearing which undoubtedly apply to a material thing, they should more so apply to the human element.").
319. *Id.* (emphasizing the burdens of Appellant Mary Brewer in having children).
320. *Id.*
321. Act of April 5, 1933, ch. 224, 1933 N.C. Sess. Laws 345 (1933) (repealed 2003).
322. *Id.* sec. 4, 1933 N.C. Sess. Laws at 346.
323. *Id.* sec. 1, 1933 N.C. Sess. Laws at 345.

sterilization was recommended.[324] A physician who had actual knowledge of the case then verified the medical history, and a social history of the patient's life was included in the petition in order to predict the likelihood of the patient to procreate.[325] A copy of the petition was then served, along with written notice to the patient or the patient's guardian, stating when the board would hear the petition.[326] The Eugenics Board would then make its decision, and if it determined that sterilization was for "the best interest for the mental, moral or physical improvement of the patient" or "for the public good[,]" then the board was required to approve the recommendation.[327]

1. The 1935 Sterilization Pamphlet

Two years after the Act's passage, the Eugenics Board published a pamphlet, *Eugenical Sterilizations in North Carolina*, that served partly as a propaganda piece and partly as a how-to manual for those seeking to obtain the Eugenics Board's approval for their patients.[328] The pamphlet began in the same way that Gosney and Popenoe's *Sterilization for Human Betterment* did—by noting that in modern society many people who survive to reach childbearing age would have died in earlier generations.[329] That is, sterilization was justified on the premise that it served the supposed purpose that nature once did—making sure that the unfit did not have children.[330] The parallels of the two works reflect the intellectual colonization of North Carolina by Gosney and Popenoe's arguments.

The pamphlet quotes a Raleigh *News and Observer* editorial supporting sterilization,[331] as well as the State Board of Public Health's study of the "Wake family," which discussed a married couple from Wake County.[332] The pamphlet also provided summary tables on the number of people sterilized through June 1935, breaking

324. *Id.* sec. 8, 1933 N.C. Sess. Laws at 347.

325. *Id.*

326. *Id.* sec. 9, 1933 N.C. Sess. Laws at 348.

327. *Id.* sec. 4, 1933 N.C. Sess. Laws at 346.

328. *See generally* BROWN, A BRIEF SURVEY OF THE GROWTH OF EUGENICAL STERILIZATION, *supra* note 43 (providing an overview of the North Carolina sterilization law and statistics on sterilization in the state).

329. *Id.* at 5.

330. *Id.* ("Under Nature's law we bred principally from the top. Today we breed from the top, the middle and the bottom, but more rapidly from the bottom." (quoting GOSNEY & POPENOE, *supra* note 48, at v)).

331. *Id.* at 5–6.

332. *Id.* at 10–11; *see supra* notes 40–45 and accompanying text (discussing the study of the "Wake family").

down the data into various categories, such as gender, race, age, and whether those sterilized were in state or county institutions or resided in the community.[333] A table also detailed common types of illnesses of those who were sterilized.[334] The pamphlet's tables—which were periodically updated in biennial reports of the Eugenics Board—reveal that once the Eugenics Board heard a petition, the request was almost always approved. From the passage of the 1933 Act until June 1935, the Board considered 236 petitions, of which it approved 231.[335] It is unclear how many, if any, of the five rejected petitions involved "consent." Of the 231 petitions approved, there was one appeal. In that one case, the superior court upheld the Eugenics Board's decision.[336] By the end of June 1935, 223 operations had been carried out (including several dozen that were approved under the 1929 law).[337] Of those, 155 had been for people in either state (140) or county institutions (15); the other 68 resided in the community.[338]

The 1935 pamphlet also reprinted several forms for facilitating approval from the Eugenics Board. The first was a petition for individuals in a state or county institution.[339] The petition recited that sterilization was in the best interest of the patient and that sterilization was for the public good; and that the inmate would "be likely, unless operated upon, to procreate a child or children who would have a tendency to serious physical, mental or nervous disease or deficiency."[340] The petition collected information on the individual, personal and family history, and their medical history. [341] The forms asked for the individual's "record of defects." [342] The list provided a number of possible "defects", including (in this order): insanity, feeble-mindedness, epilepsy, convulsions, paralysis, sexual

333. BROWN, A BRIEF SURVEY OF THE GROWTH OF EUGENICAL STERILIZATION, *supra* note 43, at app. A, 16–20.

334. *Id.* at app. A, 19 tbl. VII.

335. *Id.* at app. A, 16 tbl. I.

336. *Id.* The majority, 179, were women; only 42 men were sterilized. *Id.* Of those in state institutions, again the majority, 103, were women; only 37 men were sterilized. *Id.* at app A, 16 tbl. II. Of those outside of institutions, the majority, 63, were women; only 5 men were sterilized. *Id.* at app. A, 17 tbl III. With regard to race, there are some noticeable differences in the types of operations that African American and white men had. Of the 28 African American men who were sterilized, the method for 20 of those was listed as "castration." *Id.* at app. A, 18 tbl. IV. Of the 16 white men, 6 were castrated and all of the others had vasectomies. *Id.* at app. A, 20 tbl. IX.

337. *Id.* at app. A, 16 tbl. II.

338. *Id.*

339. *Id.* at app. B, 28 (form 1).

340. *Id.*

341. *Id.*

342. *Id.*

promiscuity, syphilis, gonorrhea, tuberculosis, alcoholism, criminality, suicidal tendency, pauper, drug addict, congenital blindness, acquired blindness, acquired deafness, dumbness, extreme nervousness, chorea (sudenhams), and chorea (Huntingtons).[343] Another briefer form was used for patients in the community,[344] and another form provided for next of kin to consent.[345] Already, two years after the passage of North Carolina's sterilization law, the administrative state was well prepared to smooth the way to sterilization of hundreds of North Carolinians, mostly women, each year.

2. The Administration of Sterilization in North Carolina

Two administrative manuals helped explain to state officials how to proceed with sterilization petitions before the Eugenics Board. The 1948 Administrative Manual was the first one that the state produced.[346] The manual contained a brief history of the North Carolina movement for sterilization, noting in particular that North Carolina was influenced by California's experience.[347] The 1948 manual also provided, perhaps unsurprisingly, a roadmap to the sterilization process. This guidance described first who may be sterilized (the "feebleminded, epileptic, and mentally diseased") and then described the circumstances in which those people may be sterilized.[348] Sterilization was possible in three instances: (1) when it is believed that such an operation would be for "the best interests of the individual concerned"; (2) "for the public good"; or (3) "when it is believed a child or children might be born who would have a tendency to serious mental or nervous disease or deficiency."[349]

The manual then identified those with responsibility and power to file sterilization petitions: the executive head of a penal or charitable organizations and the county superintendent of public welfare.[350] The manual also provided instructions regarding the forms

343. *Id.*

344. *Id.* at app. B, 30–31 (form 2).

345. *Id.* at app. B, 33 (form 6a).

346. *See* Alfred Brophy, *The Administrative Law of Sterilization*, FAC. LOUNGE (Apr. 23, 2012), http://www.thefacultylounge.org/2012/04/the-administrative-law-of-sterilization.html [https://perma.cc/LKG3-DMKB]. *See generally* THE EUGENICS BD. OF N.C., MANUAL, EUGENICS BOARD OF NORTH CAROLINA (1948), http://digital.ncdcr.gov/cdm4/document.php?CISOROOT=/p249901coll22&CISOPTR=417440&REC=2 [https://perma.cc/QW2T-RSBH].

347. THE EUGENICS BD. OF N.C., *supra* note 346, at 7.

348. *Id.* at 9.

349. *Id.*; *see also* Act of Apr. 5, 1933, ch. 224, sec. 4(1)–4(3), 1933 N.C. Sess. Laws 345, 345–46 (repealed 2003).

350. THE EUGENICS BD. OF N.C., *supra* note 346, at 9–10.

to use.[351] The forms differed based on whether the person to be sterilized was institutionalized or resident in the community.[352] The manual instructed that the petition for sterilization should provide information regarding the "likelihood of the person to procreate a child or children who would have a tendency to serious physical, mental, or nervous disease or deficiency, and . . . [t]he reasons why it is considered to be for the public good that the individual have the operation."[353]

Perhaps tellingly, the manual's instructions do not ask for specific evidence of why sterilization was in the best interest of the individual, even though the sterilization statute provided that the best interest of the individual was one reason that could support a sterilization.[354] This omission suggests that the emphasis of the Eugenics Board was shifting to procreation and to public good, signaling that the board was no longer so focused on the supposed benefits to the individual to be sterilized.

Finally, the manual turned to the critical issue of consent, explaining that the Eugenics Board was more likely to approve a procedure if either the individual or an authorized family member consented.[355] It provided a form for individuals who were competent to consent (at least twenty-one years of age, not confined in one of the four state mental hospitals, nor mentally unsound).[356] Others needed the consent of a spouse, parent, next of kin, or guardian.[357] If the person to be sterilized was married, then the spouse's consent was recommended.[358] If the spouse could not be located, then the next of kin could suffice.[359] If the person to be sterilized was a minor, consent of a parent—preferably the father—was needed, or a guardian ad litem if there was no parent.[360] In those cases where consent had not been obtained, the Eugenics Board was required to hold a hearing "in which reasons for and against the operation [were] heard."[361]

351. *Id.* at 10–11.
352. *Id.*
353. *Id.* at 12.
354. *Id.*; s*ee also* Act of Apr. 5, 1933, ch. 224, sec. 4(1), 1933 N.C. Sess. Laws 345, 346 (repealed 2003).
355. THE EUGENICS BD. OF N.C., *supra* note 346, at 12–14.
356. *Id.* at 12–13, 31–32 (form 6-B).
357. *Id.* at 13, 30–31 (form 6-A).
358. *Id.* at 13.
359. *Id.*
360. *Id.* at 13–14.
361. *Id.* at 15–16 (discussing procedure for notice of hearing when "when necessary consents are not secured").

The 1948 manual's outline of procedures, particularly around consent, leads naturally to several questions concerning the procedure for securing "consent." Maybe the most important is how did state actors secure consent? What proportion of petitions had consent? How often did the board reject petitions where there was consent? What evidence did the board require where there was no consent? In what proportion of contested cases did they reject contested petitions? And what can we discover about the nature of the board's deliberations? In short, how did the board operate? These foundational questions regarding the meaning of "consent" and how the state behaved when it was depriving its citizens of the right to procreation are difficult to answer given the limited and aggregate data that the Eugenics Board released.[362] The data does not indicate how the practices varied depending on the race, gender, and age of the sterilization targets.[363]

We desperately need a better picture of how the process worked from the view of petitioners—the hospitals and the county superintendents of public welfare. That picture should address how the petitioners selected people to suggest for sterilization. We need to know much more as well about the mysterious process by which individuals and their families were convinced to agree to sterilization. Finally, we need to know more about how the state reacted in the instances in which the individuals and families would not agree to sterilization.

Moya Woodside's 1950 book, *Sterilization in North Carolina: A Sociological and Psychological Study*, alludes to the mechanics of this coercive process.[364] In spite of being published well after sterilization was on the decline, her book represented an attempt to sustain the eugenics movement. The epigram for the book, for instance, was taken from famed North Carolina political scientist Howard Odum: "In the modern world of technology the folkways are supplanted

362. *See infra* Section V.B.3 (discussing aggregate data that is available in the Eugenics Board's biennial reports). *See generally* EUGENICS BD. OF N.C., 16 BIENNIAL REPORT: JULY 1, 1964 TO JUNE 30, 1966 (1966), [hereinafter 1966 BIENNIAL REPORT] http://archives.hsl.unc.edu/nchh/nchh-08/nchh-08-016.pdf [https://perma.cc/XQ77-E5ZL] (providing aggregated race, gender, and age data in the Eugenics Board's 1966 biennial report).

363. *See* 1966 BIENNIAL REPORT, *supra* note 362, at 25–26, tbls. 16 & 17.

364. MOYA WOODSIDE, STERILIZATION IN NORTH CAROLINA: A SOCIOLOGICAL AND PSYCHOLOGICAL STUDY 19 (1950) ("The law appears to have a compulsory character, since it is made the duty of institution or welfare superintendents to bring forward suitable cases for sterilization; and sworn consent is not required from the individual if he or she is a minor or inmate of a State mental institution. In practice this compulsory power is rarely exercised.").

largely by the technicways. If change can be brought about, it can best be done by understanding the folkways and substituting the technicways for them."[365] That is, Woodside seems to support a substitution of the "folkways" of all citizens having children for the "technicways" of eugenics.

Yet, Woodside realized the challenges sterilization faced and thus included a chapter that addressed "[d]ifficulties [i]mpeding [w]ider [a]cceptance."[366] This inclusion was a final call in defense of eugenics, about a decade after sterilization had been rejected elsewhere in the United States and as others were regularly rejecting sterilization. She provides a picture of how the process worked in practice, in conjunction with North Carolina's code.

The sterilization process in North Carolina began with a petition from the head of an institution or a county welfare official or a petition from a family member attesting that sterilization was in the best interest of society.[367] If there was consent from the individual or a family member, then authorization by the board seemed to be easy. In most instances, apparently, there was consent by either the individual or a family member. Woodside reported that all but ten of the 276 petitions filed with the Eugenics Board between 1944 and 1946 included consent forms.[368] In fact, many of the people involved in the process complained about the procedural hurdles to sterilization. That is, health officials at the center of petitioning the Eugenics Board found the procedures burdensome and difficult to meet unless there was consent by the individual or a family member.[369]

These statements leave significant questions about what process was used to obtain consent from individuals or family members. Woodside gives some sense of how consent was obtained by discussing what she called "education."[370] However, her examples reveal that there was often substantial opposition to sterilization by family members.[371] What remains unknown are the number of people sterilized with consent of a family member and the number sterilized

365. *Id.* at xiii (quoting HOWARD W. ODUM, UNDERSTANDING SOCIETY 225 (1947)).

366. *Id.* at 60 ("Chapter 5: Difficulties Impeding Wider Acceptance of Sterilization"). *See generally id.* at 69–74 (discussing legal and procedural difficulties associated with sterilization procedures).

367. *See id.* at 10–12 (describing the procedure required to petition for a sterilization procedure).

368. *Id.* at 13.

369. *Id*. at 70–71.

370. *Id*.

371. *Id.* at 91.

with their own consent. Most importantly, it still remains unknown what "consent" means or how it was obtained. Answers to these questions would tell us a great deal about the course of sterilization in North Carolina. We can infer that "consent" was coerced in many cases.[372] However, the leading historian in this area has estimated that twenty percent of the consensual sterilizations were voluntarily sought by patients as part of a normal family planning process.[373]

One other gauge of the Eugenics Board's interpretation of "consent" comes from the administrative manuals they produced.[374] As already noted, the 1948 manual provided forms and advice to state officials who prepared petitions to sterilize individuals.[375] Even as late as 1948, the manual presented a positive case for sterilization.[376] For instance, the manual stated that sterilization "permits patients, who would otherwise be confined to institutions during the fertile period of life, to return to their homes and friends."[377] The 1960 manual backed off the 1948 manual's statements about positive aspects of eugenics, instead acknowledging that the effects of sterilization are "physical as well as emotional and that there will be both positive and negative factors to consider."[378] This later manual presented sterilization as "part of a broad system of protection and supervision of those individuals unable to meet their responsibilities as parents and citizens."[379] And the 1960 manual emphasized the participation of those who were sterilized and their families, as well as health care providers.[380] In essence, the 1960 manual established a more nuanced and co-operative vision for sterilization.

372. Woodside, for instance, writes that the overwhelming number of petitions presented to the Eugenics Board in the two years leading up to June 1946 (266 of 276 petitions presented) had "consents." *Id.* at 13. However, she acknowledged that this was perhaps the result of "careful selection and interpretation." *Id.* Although she wrote of the importance of preserving individual liberty, she acknowledged that "theoretical concepts of individual liberty are often remote from the sort of practical situation in which sterilization is usually proposed." *Id.* at 24. Woodside devoted a chapter to discussing the stiff resistance in the community to sterilization and how hard state welfare had to work to get patients to agree to sterilization, which further suggests the amount of "coercion" that was involved. *See id.* at 60–95.

373. SCHOEN, *supra* note 14, at 113.

374. *See* Brophy, *supra* note 346.

375. *See supra* notes 355–361 and accompanying text.

376. *See* THE EUGENICS BD. OF N.C., *supra* note 346, at 7 (presenting positive view of sterilization and stating that it "carries no stigma or humiliation").

377. *Id.* at 8.

378. THE EUGENICS BD. OF N.C., MANUAL: THE EUGENICS BOARD OF NORTH CAROLINA, sec. 10 (1960), http://digital.ncdcr.gov/cdm4/document.php?CISOROOT=/p249901coll22&CISOPTR=417492&REC=3 [https://perma.cc/SHG7-MD9U].

379. *Id.*

380. *Id.*

This change in language invites several interpretations. In some ways, it shifted the focus to the people sterilized and away from the benefits of sterilization for the state. On the other hand, the language of the 1960 manual made a gross violation of personal autonomy seem like something in the best interest of the person sterilized. The later manual framed the issue from the perspective of the person to be sterilized. "The law" provides, the manual noted, "for the sterilization of individuals . . . when such individuals are found to be in need of the protection of sterilization from the standpoint of their social, emotional, mental and physical development and related environmental factors."[381] By 1960, the focus of the state's regulation of procreation had shifted from the good of the state to the supposed good of the patient.

The 1960 manual also provided more guidance than the 1948 manual on the meaning of "consent." Among other things, the revised manual mandated that the individual's "spouse, parents, and/or next of kin have participated in the casework plan leading to the decision for sterilization."[382] And, along with this new focus, it added a new form to provide more guidance on a person's "social history" to "giv[e] an explanation as to why sterilization seems to be indicated."[383]

The changes within the revised manual correlated with changing numbers of people sterilized, too. The next Section turns to the data provided in the biennial reports of the Eugenics Board to trace out the nature of changes in sterilization, from the gender, race, and age of those sterilized to the changes in the proportion of people in institutional settings who were sterilized. By analyzing the aggregate data released by the Eugenics Board from the 1930s to the 1960s, this Article endeavors to provide broad answers to the questions about consent in the operation of North Carolina's eugenics regime.

3. North Carolina's Data: "Compulsion and Consent"[384]

The role of consent is central to understanding the nature and scope of North Carolina's sterilization program, but many important questions remain unanswered. There are some summary figures,

381. *Id.* at sec. 30.

382. *Id.* at sec. 50. The manual provides that "the individual for whom sterilization is being considered, the spouse, parents, and/or next of kin have participated in the casework plan leading to the decision for sterilization." *Id.*

383. *Id.* at sec. 40; *Id*. at sec. 50 ("Form No. 7 – Supplement to Form no. 1. Petition for Sterilization – Social Information").

384. WOODSIDE, *supra* note 364, at 19.

however, from which some inferences can be drawn. The Eugenics Board's 1966 annual report set forth historical figures on the number of people sterilized each year from 1929 through 1966.[385] The data is broken down between patients who were institutionalized and patients who were based in the community, as indicated in Table 1.[386] Surprisingly, the height of sterilization in North Carolina was in the 1950s, well after most other jurisdictions' eugenics programs had begun to decline.[387] In fact, the Eugenics Board seems to have been quite proactive in the decade after World War II ended. The publication of the 1948 administrative manual coincided with the increase in sterilizations.[388] Perhaps that administrative manual, by making clearer the procedures to be used, was instrumental in the Eugenics Board's increased effectiveness.[389]

The biennial reports of the Eugenics Board reveal that only a small percentage of people were sterilized over the objection of their family members, especially after 1936.[390] Table 2 lists the percentage of petitions received by the Eugenics Board in two-year segments from 1934 to 1966 for which there was no consent by the individual or family members.[391] After the first biennial report (1934–1936), when the Eugenics Board was apparently still working out strategies for effectively finding and approving people for sterilization, the petitions almost always had the consent of family members.[392] From 1936 to 1954, there were never more than 6.5% of the petitions in any biennial period that lacked consent.[393] As the 1944 biennial report observed, "if the case for sterilization is properly presented, the cooperation of the family can be secured in most instances."[394] From 1956 onward, the biennial reports list no cases where there was no "consent."[395] Apparently there were very few, if any, such cases.[396]

385. 1966 BIENNIAL REPORT, *supra* note 362, at 26.

386. *See infra* Appendix, Table 1.

387. *See infra* Appendix, Table 1 & 4.

388. *See infra* Appendix, Table 1 & 4.

389. *See, e.g.*, ELSIE PARKER, EUGENICS BD. OF N.C., 8 BIENNIAL REPORT: JULY 1, 1948 TO JUNE 30, 1950, at 10 (1950) [hereinafter 1950 BIENNIAL REPORT], https://archive.org/details/biennialreporteug08nort [https://perma.cc/P7DV-4B3J] (touting the increase in sterilizations over the previous biennial period).

390. *See* WOODSIDE, *supra* note 364, at 13 ("Few petitions are presented without consents attached.").

391. *See infra* Appendix, Table 2.

392. *See infra* Appendix, Table 2.

393. *See infra* Appendix, Table 2.

394. R. EUGENE BROWN, EUGENICS BD. OF N.C., 6 BIENNIAL REPORT: JULY 1, 1942 TO JUNE 30, 1944, at 8 (1944) [hereinafter 1944 BIENNIAL REPORT], https://archive.org/details/biennialreporteug05nort [https://perma.cc/DZ5L-2KDA].

395. *See infra* Appendix, Table 2.

Similarly, the 1960 biennial report noted the usual cooperation: "[T]he individual and husband, or wife, or close relative usually participate in the plan and make their own decision in favor of the operation before signing the consent."[397] In the few instances when family consent was not obtained, the Eugenics Board still seems to have moved forward. For instance, in the 1948–1950 period, 81% of the petitions filed without family consent were still approved.[398]

There was at least nominal "consent" for the vast majority of sterilizations approved by the Eugenics Board. What remains unclear—and will almost surely remain unclear until there is a systematic study of records that are not yet open to the public—is how much of the purported "consent" was actually coerced. The biennial reports frequently reference the difficulty of obtaining consent from men. The 1948–1950 biennial report, for instance, reported, "[m]en need much interpretation to assure them that the operation is simple and that its only effect is the prevention of parenthood."[399] As shown in Table 4, the dramatic decline in the percentage of men who were sterilized, particularly after the mid-1950s, may reflect the difficulty of coercing men or the relative ease of coercing women.[400]

Moreover, the distinction between the treatment of people from the community as opposed to those who were institutionalized merits significant attention. A review of the administrative process indicates that those based in the community could only have been sterilized through consent—though here, again, what consent meant and how much coercion was involved in obtaining "consent" is difficult, if not

396. Or, if there were any such cases, the state may have been more inclined to report non-consensual sterilizations because of the growing social stigma attached to the practice.

397. EUGENICS BD. OF N.C., 13 BIENNIAL REPORT OF THE EUGENICS BOARD OF NORTH CAROLINA, JULY 1, 1958 TO JUNE 30, 1960, at 7 (1960) [hereinafter 1960 BIENNIAL REPORT], https://archive.org/details/biennialreporteug13nort [https://perma.cc/XK37-R6RJ].

398. 1950 BIENNIAL REPORT, *supra* note 389, at 13.

399. *Id.* at 11.

400. *See infra* Appendix, Table 4. The Eugenics Board often noted its efforts to secure compliance in their biennial reports. For instance, the Board prepared a report in the early 1950s regarding children of people who were subsequently sterilized. The study suggested that the children were disproportionately developmentally disabled. 1950 BIENNIAL REPORT, *supra* note 393, at 9 (discussing on-going study); ETHEL SPEAS, EUGENICS BD. OF N.C., 9 BIENNIAL REPORT: JULY 1, 1950 TO JUNE 30, 1952, at 8–10 (1952) [hereinafter 1952 BIENNIAL REPORT], https://ia800208.us.archive.org/2/items/biennialreporteug09nort/biennialreporteug09nort.pdf [https://perma.cc/S7ZM-27WJ] (discussing results of the study, which was published in North Carolina State Board of Public Welfare's *Public Welfare News* (March 1952)). Such studies, thus, might provide further support for the Board's efforts to encourage sterilization.

impossible, to determine at this point. Thus, while the number of institutionalized people sterilized remained in the hundreds through the middle of the 1950s, by the 1960s more than eighty percent of people sterilized resided in the community.[401]

When social workers did extract consent, the Eugenics Board did not hold a hearing.[402] The Board only conducted hearings in cases where neither the patient herself nor the patients' next of kin consented. [403] The Eugenics Board approved the vast majority of petitions in the early years, but by the 1960s, was routinely rejecting petitions.[404] For instance, while from 1934 to 1936, the Board authorized 301 of the 309 petitions presented, from 1964 to 1966, it authorized only 368 of the 461 petitions presented.[405]

Some hint of just how much planning was involved on the part of public health officials to obtain "consent" of family members to sterilization appears in Moya Woodside's book, *Sterilization in North Carolina*.[406] Woodside described the ideas and practices of social workers as they tried to convince North Carolinians to accept sterilization.[407] Woodside detailed the opposition that state welfare workers faced when encouraging sterilization.[408] She noted that individuals undergoing sterilization procedures and their family members often proved quite obstinate.[409] For instance, she reported that "[o]ne of the Negro gynecologists, accustomed to talk with husbands for permission to operate on their wives, said he thought an important factor in refusal was the pride a man had in his ability to make his wife pregnant."[410] Sometimes the social workers' discussion of opposition to sterilization was infused with racial prejudice. For

401. *See* 1952 BIENNIAL REPORT, *supra* note 400, at 8. In the early 1950s, the Eugenics Board pushed the sterilization of people in institutions, which accounts for the jump in sterilizations of the institutionalized. *See infra* Appendix, Table 1.

402. *See* BROWN, A BRIEF SURVEY OF THE GROWTH OF EUGENICAL STERILIZATION, *supra* note 43, at 14.

403. *See id.*

404. 1966 BIENNIAL REPORT, *supra* note 362, at 25, tbl. 11; *see infra* Appendix, Table 2.

405. 1966 BIENNIAL REPORT, *supra* note 362, at 25, tbl. 11; *see infra* Appendix, Table 3.

406. WOODSIDE, *supra* note 364, at 164–67 (noting the need for "education" and outlining different lines of "[p]ropaganda" to promote sterilization).

407. *See id.* at 94–95, 164–67; *see also* Mary Ziegler, *Reinventing Eugenics: Reproductive Choice and Law Reform After World War II*, 14 CARDOZO J.L. & GENDER 319, 323 (2008).

408. WOODSIDE, *supra* note 364, at 94–95 (summarizing the perceived challenges to obtaining consent and acceptance of sterilization).

409. *Id.* at 61–62.

410. *Id.* at 68.

instance, one welfare worker wrote that "the Negroes tend to resist more than the whites which may be due to ignorance and superstition which is more prevalent among the Negroes than the whites."[411] Woodside herself wrote about the opposition in rural North Carolina more broadly, stating that "[a]mong such backward and isolated groups as we have described, no great response can be expected to proposals of a scientific nature which run counter to folkways and experience."[412]

Woodside's description of petitions before the Eugenics Board reveals that individuals may have been subject to coercion or worse. While some patients provided consent themselves, many others had consent forms signed by family members.[413] For instance, one twenty-three-year-old man who already had one child and was described as a "borderline mental defective" consented, along with his wife, to his sterilization.[414] A single, twenty-five-year-old African American woman who had a fifth grade education and who was described as "sexually promiscuous" and "physically and mentally incapable of protecting herself" signed her consent form, along with her sister.[415] A seventeen-year-old African American girl who was in the Samarcand institution and had an I.Q. of fifty-eight had her consent form signed by her grandmother.[416] Those cases, perhaps representative, suggest that even when there was consent by an individual, that individual may not have had an adequate understanding of their actions. In other cases, the consent was extracted from family members who may themselves have been subject to coercion.[417]

411. *Id.* at 85.
412. *Id.*
413. *Id.* at 16–18.
414. *Id.* at 17.
415. *Id.*
416. *Id.*
417. As part of North Carolina's office of Justice for Sterilization Victims Foundation, a few redacted petitions were released, which illustrate the kinds of family and personal histories that were used to justify sterilization. These petitions reflect how little background the Eugenics Board members had available to them when deciding on a petition. *See, e.g.*, R. Eugene Brown, EUGENICS BD. OF N.C., *Form No. 1. Petition for Operation of Sterilization or Asexualization. Inmate of State or County Institution*, *in* BROWN, A BRIEF SURVEY OF THE GROWTH OF EUGENICAL STERILIZATION, *supra* note 43, at 28 app. B. As part of the contemporary movement for compensation, a number of stories about the nature of "consent" have come to light as well. *See, e.g.*, Kevin Begos & John Railey, *Sign This or Else: A Young Woman Made a Hard Choice, and Life Has Not Been Peaceful Since*, WINSTON-SALEM J. (Dec. 9, 2002, 1:27 PM), http://www.journalnow.com/news/local/sign-this-or-else/article_3e865b26-8c03-11e2-b819-001a4bcf6878.html [https://perma.cc/3F8Q-F35W]; Kevin Begos, *Sterilization Was Often the Way Out: State Hospitals, Training Schools Had Captive Population, but Staffers and Social Workers Were Sometimes at Odds*, WINSTON-SALEM J. (Dec. 9, 2002, 1:09 PM), http://www.journalnow

C. The 1974 Revisions and the Role of the Supreme Court of North Carolina

In the early 1970s, North Carolina continued its retreat from sterilization. In 1974 the North Carolina legislature transferred jurisdiction over compulsory sterilization to the state courts.[418] The statute transferred authority to hear the case to the North Carolina courts, but maintained the familiar grounds for authorization from the 1933 legislation.[419] When considering a petition for involuntary sterilization, the court could approve the procedure if one of the following criteria was met: (1) the sterilization was deemed to be in the best interest of the individual or the public good, (2) the individual would be likely to have a child with a serious disability or the individual could not care for a child, or (3) the next of kin or guardian had requested the procedure.[420] Thus, the law continued to authorize involuntary sterilization when in the best interest of the state.

The new legislation led to a challenge that made its way up to the Supreme Court of North Carolina in 1976 in *In re Sterilization of Moore*.[421] The case arose from a petition filed by the Forsythe County Department of Social Services requesting sterilization of a minor child, Joseph Lee Moore, who had an IQ of forty.[422] The justification for the procedure was that the child, if not sterilized, would likely have children with serious disabilities.[423] Although the Forsyth County Superior Court held the statute to be unconstitutional,[424] the Supreme Court of North Carolina upheld the law.[425] In an odd juxtaposition of citations, the court cited *Roe v. Wade* and *Buck v. Bell* in the same sentence.[426] But instead of focusing on *Roe*'s finding

.com/news/local/sterilization-was-often-the-way-out/article_97931328-8fee-11e2-bf88-0019bb30f31a.html [https://perma.cc/9LJF-HYE8]; John Railey, *'It Ain't Fair': Old IQ Score Helped Social Workers Get Reluctant Teen-ager Sterilized*, WINSTON-SALEM J. (Dec. 9, 2002, 12:00 AM), http://www.journalnow.com/news/local/it-ain-t-fair/article_811cc532-8fec-11e2-92a5-0019bb30f31a.html [https://perma.cc/E5QC-5XGL].

418. Act of Apr. 11, 1974, ch. 1281, sec. 1, §§ 35–37, 1973 N.C. Sess. Laws 458, 458 (repealed 2003).

419. These grounds track section 4 of North Carolina's 1933 legislation. *See* Act of Apr. 5, 1933, ch. 224, sec. 4, 1933 N.C. Sess. Laws 345, 346 (repealed 2003).

420. Act of Apr. 11, 1974, ch. 1281, sec. 1, § 35-39, 1973 N.C. Sess. Laws 458, 459 (repealed 2003).

421. 289 N.C. 96, 221 S.E.2d 307 (1976).

422. *Id.* at 96, 221 S.E.2d at 308–09.

423. *Id.* at 104–05, 221 S.E.2d at 313.

424. *Id.* at 109, 221 S.E.2d at 316.

425. *Id.* at 104–05, 221 S.E.2d at 313.

426. *Id.* at 102, 221 S.E.2d at 312 (citing Roe v. Wade, 410 U.S. 113, 154 (1973); Buck v. Bell, 274 U.S. 200, 207 (1927)).

of a right to control one's own reproductive rights, the court focused on *Roe*'s finding of a limitation on the right to control one's own reproductive rights after the first trimester. Thus, the court focused on *Roe*'s acknowledgement of the state's interest in regulating reproduction.[427]

Amazingly, the court then went on to state that the "welfare of all citizens should take precedence over the rights of individuals to procreate."[428] Thus, the Supreme Court of North Carolina read *Roe*'s concession that the state could limit the right of choice after the first trimester in conjunction with *Buck* to limit the reproductive freedom of a developmentally disabled child. In language reminiscent of the eugenics literature of the 1910s and 1920s, the court stated: "It is the function of the Legislature, and its duty as well, to enact appropriate legislation to protect the public and preserve the race from the known effects of the procreation of mentally deficient children by the mentally deficient . . . ."[429] The *In re Moore* opinion also distinguished the North Carolina statute from the one struck down in *Skinner v. Oklahoma*, because the law applied equally to all developmentally disabled persons without distinction.[430]

Recognizing the "duty" of the legislature to "preserve the race" through the enactment of sterilization laws, the court validated not only the North Carolina sterilization law, but also the eugenics movement as a whole.[431] *In re Moore* has never been expressly overturned, though whether it would survive constitutional muster today is questionable.[432] It was against this backdrop, with the most

427. *Id.* at 102–03, 221 S.E.2d at 312.

428. *Id.* at 103, 221 S.E.2d at 312.

429. *Id.* (quoting *In re* Cavitt, 157 N.W.2d 171, 175 (Neb. 1968)).

430. *Id.* at 105, 221 S.E.2d at 313–14.

431. *Id.* at 103, 221 S.E.2d at 312; *see* DAREN BAKST, *North Carolina's Forced-Sterilization Program: A Case for Compensating the Living Victims*, JOHN LOCKE FOUND. 16 (2011), http://www.johnlocke.org/acrobat/policyReports/NCeugenics.pdf [https://perma.cc/PRJ2-LA8W]. Shortly after the decision in *In re Sterilization of Moore*, a federal district court largely upheld the sterilization statute in a constitutional challenge brought by the North Carolina Association for Retarded Children and the United States as intervener, but struck down the provision allowing the next of kin or guardian to request a petition on the person's behalf. N.C. Ass'n for Retarded Children v. North Carolina, 420 F. Supp. 451, 458–59 (M.D.N.C. 1976) (invalidating Act of Apr. 11, 1974, ch. 1281, sec. 1, § 35-39(4),1973 N.C. Sess. Laws 458, 459).

432. While both *In re Moore* and *Buck* have been cited as good law in the twenty-first century, the cold economic calculations behind these decisions, as well their racial underpinnings, have been roundly rejected by modern constitutional jurisprudence. *See, e.g.*, Seth F. Kreimer, 9 U. PA. J. CONST. L. 423, 427 (2007). *But see* Vaughn v. Ruoff, 253 F.3d 1124, 1229 (8th Cir. 2001) (citing Buck v. Bell, 274 U.S. 200, 207–08 (1927)) (permitting state limitations on reproductive rights of developmentally disabled citizens, but still permitting suit for violations of constitutional rights to go forward against state

recent opinion of the state's highest court having bucked the spirit of *Roe* and staked out its support for the eugenics movement, that North Carolinians began to uncover and reject this thinking.

D. The Legacy of Sterilization in North Carolina

As more people began to understand North Carolina's eugenics program, support grew for the notion that the State should apologize, including in monetary terms, to those sterilized by the Eugenics Board. One step on the road to pursuing compensation was taking stock of just what the State had done, and on what scale, in the name of economic expediency. North Carolina oversaw one of "the largest and most aggressive sterilization programs" in the country.[433] Between 1929 and 1974, nearly 7,600 men and women were sterilized as a result of the program.[434] Some of the sterilization victims included boys and girls as young as ten years old.[435] In part because of the legacy of *In re Moore*, involuntary sterilizations continued as late as 1980.[436] In fact, the statute permitting involuntary sterilizations remained in effect in North Carolina until 2003.[437]

The sterilization program disproportionately affected certain groups. Women accounted for nearly 85% of the sterilization victims.[438] As Table 4 reveals, over time, the percentage of women sterilized increased.[439] Although in 1934, as the sterilization procedures were being worked out, men were disproportionately sterilized (only 34.8% of the people sterilized that year were women), and every year after that saw a substantially greater proportion of

actor who coerced developmentally disabled adult to undergo sterilization); Britt v. State, 363 N.C. 546, 551, 681 S.E.2d 320, 323 (2009) (Timmons-Goodson, J., dissenting) ("Moreover, it is well settled that '[a]cting for the public good, the state, in the exercise of its police power, may impose reasonable restrictions upon the natural and constitutional rights of its citizens.' " (quoting *In re* Sterilization of Moore, 289 N.C. at 103, 221 S.E.2d at 312)); Conservatorship of Valerie N., 707 P.2d 760, 762 (Cal. 1985) (holding a law banning such sterilizations to be unconstitutional for "den[ying] incompetent developmentally disabled persons rights which are accorded all other persons in violation of state and federal constitutional guarantees of privacy"); BAKST, *supra* note 431, at 16.

433. *See* Begos, *supra* note 28.

434. GOVERNOR'S TASK FORCE, FINAL REPORT, *supra* note 26, at 5; Begos, *supra* note 28.

435. *See* GOVERNOR'S TASK FORCE, FINAL REPORT, *supra* note 26, at 7; Begos, *supra* note 28.

436. *See In re* Johnson, 45 N.C. App. 649, 652–54, 263 S.E.2d 805, 808–09 (1980) (upholding the involuntary sterilization of a mildly mentally retarded and developmentally disabled woman); BAKST, *supra* note 431, at 13.

437. Act of Apr. 10, 2003, ch. 13, sec. 1, 2003 N.C. Sess. Laws 11, 11–12.

438. GOVERNOR'S TASK FORCE, FINAL REPORT, *supra* note 26, at 7.

439. *See infra* Appendix, Table 4.

women than men sterilized.[440] By the 1960s, well over 90% of the sterilizations were performed on women.[441] Although white and African American people (and a few Native Americans) were sterilized with the approval of the Eugenics Board, African Americans were disproportionately sterilized in much of the period after World War II.[442] In fact, in every biennial report from 1946–1948 to 1964–1966, the percentage of African Americans sterilized increased, from under 20% between 1946–1948 to nearly two-thirds between 1964–1966.[443] That the program became more focused on race in the era of the Civil Rights movement also invites further investigation.[444] Also, some evidence suggests that race was very much on the minds of the state welfare officers charged with implementing North Carolina's eugenics program.[445] The percentage of African American sterilized certainly increased over the period from 1946–1948, when fewer than 20% of the people sterilized were African American, to 1964–1966, when African Americans accounted for 64% of those sterilized.

VI. THE CASE FOR REPARATIONS AND LIMITING PRINCIPLES

A. The North Carolina Reparations Program

For nearly a decade after Governor Easley's public apology in 2002, some advocates in North Carolina quietly pursued compensation for those who had been sterilized.[446] Then, in 2011, Governor Beverly Purdue established a "Governor's Task Force to Determine the Method of Compensation for Victims of North

440. *See infra* Appendix, Table 4

441. *See infra* Appendix, Table 4

442. *See infra* Appendix, Table 5.

443. *See infra* Appendix, Table 4

444. *See infra* Appendix, Table 4.

445. *See, e.g.*, WOODSIDE, *supra* note 364, at 83–88 (discussing attitudes towards African Americans by county health department workers and those workers' assessment of African Americans). While Woodside herself at several points disclaimed her belief that race (as opposed to level of education) was a significant variable, *id.* at 83, at other points she focuses on what she identifies as the different moral standards regarding family and sex in the African American and white communities—the former of which she implies lie at least partly in the era of slavery. *Id.* at 83–84. Thus, when she wrote that "[n]or are number of children a matter for concern since this type of Negro, lacking incentive and opportunity for achievement of a higher standard of living, rarely envisages long-term goals and is content to live from day to day, taking whatever comes," *id.* at 83–84, it is easy to see her assessment of race as central to her assessment of the people she discusses.

446. Jon Ostendorff, *Eugenics Victims Closer to Payout*, ASHEVILLE CITIZEN-TIMES, May 23, 2012, at A1, A6.

Carolina's Eugenics."[447] The Governor's Task Force recommended that each then-living person who was sterilized receive $50,000.[448] The estates of those who had already passed away would receive nothing under this plan. While one might think that the victims would have no children, a significant number of people who were sterilized conceived children before they were sterilized.[449]

In 2012, supporters of compensation introduced a bill, to be funded with $10,000,000, to provide each "qualified recipient" with $50,000.[450] A "qualified recipient" was defined broadly as: "[a]n individual who was asexualized or sterilized under the authority of the Eugenics Board in accordance with Chapter 224 of the Public Laws of 1933 or Chapter 221 of the Public Laws of 1937, and who was living on May 16, 2012."[451] So anyone—regardless of the circumstances—who was sterilized by order of the Eugenics Board and survived until May 2012 would be entitled to compensation. However, the nature of the sterilizations that took place in North Carolina varied widely, from people who were sterilized involuntarily outside of the Eugenics Board,[452] to people who were sterilized with the permission of their families,[453] to people who themselves sought out sterilization as a method of family planning.[454] One scholar

447. GOVERNOR'S TASK FORCE, FINAL REPORT, *supra* note 26, at 4.

448. *Id*. at 11.

449. *Id.* at 1. While the number of sterilization victims who had children before sterilization is unknown, the North Carolina Governor's Task Force discussed whether victims' children should receive compensation. *See id.* at 1.

450. H.R. 947, 2011 Gen. Assemb., Reg. Sess. (N.C. 2012).

451. *Id.* sec. 1, § 143B-426.50(4). The bill excluded compensation as available assets for determination of eligibility for government assistance programs. *Id.* sec. 1, § 143B-426.56(a). The bill also provided for redacted records of the Eugenics Board for public inspection. *Id.* sec. 4, § 132-1.23.

452. *See, e.g.*, Rose Hoban, *Eugenics Compensation Amendment Continues to Leave Some Victims Out*, N.C. HEALTH NEWS (May 29, 2015), http://www.northcarolinahealthnews.org/2015/05/29/eugenics-compensation-amendment-continues-to-leave-some-victims-out/ [http://perma.cc/C93Y-Z5BQ] (discussing people who claim to have been sterilized outside of the Eugenics Board and, therefore, do not have documentation necessary to receive compensation).

453. *See* Act of Apr. 5, 1933, ch. 224, § 2, 1933 N.C. Sess. Laws 345 (repealed 2003).

454. *See, e.g.*, SCHOEN, *supra* note 14, at 119–22 (noting that some petitions to Eugenics Board were for family planning and contraceptive purposes). Schoen goes on to note that petitions for family planning increased dramatically around 1959 and continued through at least 1964. *Id.* at 122. The 1933 legislation provided that sterilizations pursuant to the Eugenics Board were performed at public expense. *See* Act of Apr. 5, 1933, ch. 224, sec. 2, 1933 N.C. Sess. Laws 345, 346 (repealed 2003). Thus, sterilizations pursuant to the Eugenics Board could be voluntary—through petition by the individual seeking sterilization—or compelled. Individuals could have their own physicians perform sterilization without any involvement or approval from the Eugenics Board. *Id.* sec. 11, 1933 N.C. Sess. Laws at 349–50.

estimated that perhaps twenty percent of the sterilizations that took place after 1960 fell into this latter category.[455] The bill passed in the North Carolina House of Representatives,[456] but failed to pass the Senate.[457]

In 2013, another bill was introduced in the North Carolina General Assembly to provide payments to sterilization victims.[458] There was a serious question as to whether anything had changed in the North Carolina Senate. North Carolina State Senator Phil Berger recalled of the 2012 debate that "[t]here was no ability to develop consensus on one particular path forward."[459] And yet, somehow, the North Carolina legislature found $10,000,000 for a public fund for reparations to sterilization victims.[460] However, the authorizing statute has some important limitations; the established fund capped liability at $10,000,000.[461] As a result, no matter how many people are ultimately able to satisfy the requirements for compensation, the liability will never go above that amount. Thus, the more people who are deemed eligible the smaller the payout to each claimant.

As enacted, the North Carolina reparations program defines eligibility more narrowly than the 2012 bill to include only people who were sterilized involuntarily and pursuant to state action by the North Carolina's Eugenics Board.[462] These two key limiting principles

455. SCHOEN, *supra* note 14, at 121.

456. *House Bill 947: Eugenics Compensation Program*, N.C. GEN. ASSEMB., http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2011&BillID=S800 [https://perma.cc/95NW-5FYR] (noting that the bill was engrossed on June 5, 2012, and sent to the Senate on June 6, 2012).

457. *See* S. 800, 2011 Gen. Assemb., Reg. Sess. (N.C. 2012); *Senate Bill 800: Eugenics Compensation Program*, N.C. GEN. ASSEMB., http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=&BillID2011=S800 [https://perma.cc/B4D3-ESH2] (noting final action on S.B. 800 was a referral to the Committee on Appropriations/Base Budget on May 17, 2012).

458. S. 421, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013).

459. Mark Binker, *McCrory's Budget: Picking Three Fights*, WRAL (Mar. 20, 2013), http://www.wral.com/mccrory-s-budget-picking-three-fights/12247453/ [https://perma.cc/EL74-CT4A].

460. N.C. GEN. STAT. §§ 143B-426.50 to 143B-426.57 (2015) (expired effective June 30, 2015 pursuant to Current Operations and Improvements Appropriations Act of 2013, ch. 360, § 6.18(g), 2013 N.C. Sess. Laws 995, 1023 (2013), as amended by An Act to Make Base Budget Appropriations for Current Operations of State Departments, Institutions, and Agencies, and for Other Purposes, ch. 100, § 6.13(e), 2014 N.C. Sess. Laws 328, 346 (2014)); Valerie Bauerlein, *North Carolina to Compensate Sterilization Victims: State Sets $10 Million Pool to Pay Subjects in Eugenics Program*, WALL ST. J. (July 26, 2013, 1:46 PM), http://www.wsj.com/articles/SB10001424127887323971204578629943220881914 [https://perma.cc/KVH6-93KX].

461. §§ 143B-426.50 to 426.51.

462. § 143B-426.50(5).

have proven to be important. First, people who were sterilized involuntarily but outside of the authorization of the Eugenics Board are left without recourse.

Second, only those who were sterilized "involuntarily" are eligible—the definition of "involuntary" is critical. Some people sought the Eugenics Board's approval for family planning purposes and they are, thus, ineligible. To help resolve the ambiguity in the definition of "involuntary," the North Carolina legislation establishes that those who were minors or incompetent are presumed to have been sterilized involuntarily and those who were both adults and competent are presumed to have been sterilized voluntarily.[463] In each case, that presumption could be rebutted by a preponderance of the evidence.[464] However, it is entirely possible that a number of competent adults were coerced into agreeing to sterilization.[465] Unfortunately, proving coercion several decades after the fact will undoubtedly be difficult, leaving those people without recourse. Thus, one major flaw with the legislation is that it leaves many people who were coerced into agreeing to sterilization or whose family members authorized the sterilization without redress.[466]

There is one other important limiting principle: claimants must have survived until June 30, 2013, to be eligible.[467] That is, there had to be a direct, living victim at the time the legislation was being debated. The lack of a direct, living victim is a frequent complaint in other reparations cases, such as those for slavery and often Jim Crow.[468] Indeed, the heirs of eugenics victims have recently brought a legal challenge, arguing this distinction violates the equal protection clause.[469]

463. § 143B-426.50(3)(a).

464. *See id.* § 143B-426.53(a) (noting all eligibility determinations must be made by a preponderance of the evidence).

465. *See supra* Section V.B.3 (discussing question of coercion in context of "voluntary" sterilization).

466. *See* Hoban, *supra* note 452.

467. § 143B-426.50(1) (providing that "[a]n individual must be alive on June 30, 2013, in order to be a claimant").

468. *See, e.g.*, ALFRED L. BROPHY, REPARATIONS PRO AND CON 151–54 (2006) (discussing problems with reparations when the immediate victims may no longer be alive and raising questions about the right of descendants of immediate victims to reparations payments).

469. *See* Sharon McCloskey, *Heirs of Eugenics Victims Denied Compensation Take Their Case to the Court of Appeals*, N.C. POLICY WATCH: PROGRESSIVE PULSE (Nov. 12, 2015), http://pulse.ncpolicywatch.org/2015/11/12/heirs-of-eugenics-victims-denied-compensation-take-their-case-to-the-court-of-appeals/#sthash.a77Jq1WV.dpuf [https://perma.cc/66L2-HWM8]. The case was recently remanded to a three-judge panel on the Wake County Superior Court for further review. *See In re* Hughes, No. COA15-699, 2016 WL 611548, at *6 (N.C.

Despite these significant limiting principles, the program does provide a precedent for further reparations in other states. This is particularly true given that the North Carolina plan also presumes that people who were minors or incompetent were sterilized involuntarily.[470] This presumption likely reflects reality and may preference the cases that are most likely to be meritorious. The North Carolina Industrial Commission decides whether someone is a qualified recipient.[471] However, out of nearly 800 claimants, only 220 people have been deemed qualified.[472] At least fifty people are appealing their rejection of their claims.[473] The initial delays associated with the payment of claims prompted the general assembly to amend the law to facilitate payments to qualified individuals.[474] To date, two payments totaling $35,000 have been distributed to each of the qualified victims under the program.[475]

Following the enactment of the legislation in 2013, there have been efforts to address some of the perceived shortfalls of the reparations program.[476] In particular, there have been several legislative efforts to provide reparations to the victims of involuntary

Ct. App. Feb. 16, 2016) (dismissing the plaintiffs' appeals and remanding the claim to the Industrial Commission for a transfer to the Wake County Superior Court for consideration of the law's constitutionality). The plaintiffs have appealed the decision regarding the proper jurisdiction of such disputes to the Supreme Court of North Carolina. Brent J. Ducharme, *Victims File Brief in Appeal to NC Supreme Court*, UNC CTR. FOR CIVIL RIGHTS (July 19, 2016, 4:00 PM), http://blogs.law.unc.edu/civilrights/2016/07/19/eugenics-victims-file-brief-in-appeal-to-nc-supreme-court/ [https://perma.cc/9L8B-3JCQ].

470. N.C. GEN. STAT. § 143B-426.50(3)(a) (2015) (providing compensation for minors who were sterilized, whether with or without consent of the parents). The Office for Justice for Sterilization Victims was established within the Department of Administration to assist victims in understanding their rights and applying for compensation. *See id.* § 143B-426.54.

471. *Id*. § 143B-426.53; *see* 4 N.C. ADMIN. CODE 10K.0100–10K.0500 (2016) (providing rules and regulations for the administration of eugenics compensation).

472. Hoban, *supra* note 452; *see* Mary Cornatzer, *First Checks Go Out to NC Eugenics Victims*, NEWS & OBSERVER (Oct. 27, 2014, 5:40 PM), http://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article10109309.html [https://perma.cc/TH7H-T8MN].

473. Hoban, *supra* note 452.

474. *Id*.

475. Craig Jarvis, *Second Eugenics Payments Issued*, NEWS & OBSERVER (Nov. 2, 2015), http://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article42276687.html [https://perma.cc/6MG6-8KLP].

476. Michael Gordon, *Closing the Loopholes on Sterilization*, CHARLOTTE OBSERVER (Feb. 20, 2016, 4:59 PM), http://www.charlotteobserver.com/news/local/crime/inside-courts-blog/article61516837.html [https://perma.cc/D2SJ-JVHW] (discussing limitations of the Act and legislative and judicial efforts to expand payments to sterilization victims).

sterilizations at the local level.[477] County officials have already voiced their support for instituting local compensation plans for sterilization victims.[478] A bill currently pending before the General Assembly would allow the state's four largest counties to pass ordinances to compensate victims of involuntary sterilization under the authority of local eugenics boards.[479] However, these ordinances would be subject to several significant limitations under the current legislation. The individual counties would be responsible for providing the reparations funds and would be under no obligation to compensate victims.[480] In addition to requiring that claims must be made by December 31, 2019, the bill also limits the definition of "qualified recipient" to include only claimants who are alive to make a claim.[481] While these legislative solutions are by no means perfect, they represent another step in the right direction towards compensating victims.

B. Factors Favoring Legislative Reparations

One of the important results of the North Carolina legislation is that it sets a precedent for other state legislators that are thinking about some sort of repair for their own eugenics programs—and potentially for other miscarriages of justice outside of the eugenics context. There are several key limiting principles that appear in the case of state-sponsored eugenics that are useful to identify. Those factors may reassure legislatures contemplating reparations that there are concrete and important distinguishing factors, so that they are not opening up an unlimited set of claims in other cases. Moreover, those factors may provide important guideposts in reviewing other

477. For example, a recent legislative proposal by Senator Jeff Jackson of Mecklenburg County to amend the law would allow people who were involuntarily sterilized by county governments to be considered "qualified recipients" and thus eligible for compensation payments. However, it failed to pass the general assembly. S. 532, 2015 Gen. Assemb., Reg. Sess. (N.C. 2015); Hoban, *supra* note 452.

478. Colin Campbell & Ann Doss Helms, *More NC Eugenics Victims Could Become Eligible for Compensation*, NEWS & OBSERVER (June 9, 2016, 6:56 PM), http://www.newsobserver.com/news/politics-government/state-politics/article82871452.html [https://perma.cc/NE82-2HG3]. Mecklenburg County commissioners recently unanimously voted to endorse a local compensation plan proposed by Senator Jeff Jackson that would provide $50,000 for each victim with a total compensation capped at $300,000. *Id.*

479. S. 29, 2016 Gen. Assemb., Reg. Sess. (N.C. 2016); Campbell & Helms, *supra* note 478. Under the current version of the legislation, Wake, Mecklenburg, Forsyth, and Guilford counties would be permitted to provide compensation to eugenics victims. Campbell & Helms, *supra* note 478.

480. Campbell & Helms, *supra* note 478.

481. S. 29, 2016 Gen. Assemb., Reg. Sess. § 153A-248.1(b) (N.C. 2016).

reparations claims. Conversely, some of these factors may be too limiting and subsequent legislatures may want to drop the limitations.

Four factors characterize reparations for sterilization from other reparations claims and make reparations for sterilization victims particularly compelling. First, the government was the bad actor here;[482] this is not a claim for the type of general societal discrimination that is so suspect in modern law.[483] Second, the harm is extraordinary and of a greater magnitude than many other intrusions on personal autonomy and liberty. There are few—if any—other episodes in the United States in the twentieth century that involved such widespread, intentional government action.[484] Third, many people at the time knew it was wrong and spoke against sterilization.[485] Fourth, direct living connections remain between the harm and repair.[486] Thus, there are some immediate, living connections to the injustices imposed those many years ago.

Why, then, were monetary reparations successful in North Carolina's case when virtually no others were in the past several decades? What is it about sterilization that allowed the North Carolina legislature to garner substantial bipartisan support? For one, the sterilization program was not geared towards one particular race, though in practice, one race may have been more affected.[487] Second,

482. *See supra* Section IV.A (discussing North Carolina legislation and the extensive administrative apparatus set up to administer the program).

483. *See, e.g.*, Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. ANN. SURVEY AM. L. 497, 530–31 (2003) (citing Richmond v. J.A. Croson, 488 U.S. 469, 497 (1989)) (noting generalized societal discrimination is insufficient to support race-conscious affirmative action).

484. Others that come to mind, such as the internment of Japanese Americans during World War II, have been the subject of compensation. *See generally* ERIC L. MULLER, COLORS OF CONFINEMENT (2012) (discussing confinement during World War II); Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 19 B.C. THIRD WORLD L.J. 477 (1998) (discussing Japanese American compensation and comparing it to African American reparations claims).

485. *See supra* Section IV.A (discussing skepticism of sterilization in law journals in the 1920s and 1930s). One of the important points here is that some people at the time knew sterilization was wrong, so this is not a question of reading twenty-first century morality back onto the actions of people some decades ago. *See* Eric L. Muller, *Judging Thomas Ruffin and the Hindsight Defense*, 87 N.C. L. REV. 757, 760–61 (2009) (warning about the perils of excusing past actions because there was a different sense of morality).

486. Those living connections were central to the Civil Liberties Act of 1988. It provided compensation to Japanese Americans interned during World War II but limited compensation to those who surviving into the 1980s. Civil Liberties Act of 1988, 50 U.S.C. §§ 4215(a), 4218(2) (2012) (limiting eligible individuals to people alive at the date of passage of the Act).

487. Claims for reparations for the eras of slavery and segregation have met with extraordinary opposition in the public and in legislatures. *See, e.g.*, BROPHY, *supra* note 461, at 4–5 (discussing public opinion polls and opposition to race-based reparations).

the class of people who would be able to seek reparation funds was known to be relatively small. The number of estimated victims still alive at the time the legislation was passed (and thus eligible for compensation) was 1,500 to 2,000.[488] Third, people across the political spectrum saw the inhumanity of North Carolina's eugenics history. Perhaps most compelling is the fact that as far back as the 1930s, legal scholars and others argued that involuntary sterilizations were improper.[489] The catalogue of legal history discussed above teaches us that people at the time of North Carolina's sterilization program realized that it was wrong. Thus, we are not reading today's sensibilities back onto decisions made by legislators, administrators, and judges in the 1930s.

The North Carolina compensation legislation also offered the opportunity for people to criticize whatever group they found responsible for this harm. In the case of some conservatives, this was the liberal scientists who refused to appreciate religious ideas.[490] In the case of liberals, this was another episode of the state depriving women of their reproductive autonomy.[491] The 2013 legislation saw a rare moment of unanimity across the political spectrum in terms of outrage about the state's actions, even if not a complete consensus on the morality of paying reparations.

The recent passage of a similar statute to compensate the victims of involuntary sterilization in Virginia suggests that North Carolina is already serving as a model for states moving forward. On October 30, 2015, the Virginia General Assembly passed legislation to compensate the victims of involuntary sterilizations.[492] Largely modeled after the North Carolina statute, the Virginia statute provides "compensation to individuals who were involuntarily sterilized pursuant to the Virginia Eugenical Sterilization Act," who

488. Jim Morrill, *Victim Advocates Want to Close Eugenics Loophole*, CHARLOTTE OBSERVER (Jan. 20, 2015, 7:39 PM), http://www.charlotteobserver.com/news/politics-government/article9262985.html [https://perma.cc/JYJ4-6D2U].

489. *See supra* Section IV.A (discussing opposition to sterilizations by law reviews).

490. *See* Maggie Gallagher, "*The Human Betterment League*," NAT'L REV. (Dec. 12, 2011, 11:14 AM), http://www.nationalreview.com/corner/285545/human-betterment-league-maggie-gallagher [https://perma.cc/9GJF-TE2Y].

491. *See* Irin Carmon, *For Eugenics Sterilization Victims, Belated Justice*, MSNBC (June 27, 2014, 9:43 PM) http://www.msnbc.com/all/eugenic-sterilization-victims-belated-justice [https://perma.cc/E2DW-FXG7]

492. *See* Jenna Portnoy, *Va. General Assembly Agrees to Compensate Eugenics Victims*, WASH. POST (Feb. 27, 2015), https://www.washingtonpost.com/local/virginia-politics/va-general-assembly-agrees-to-compensate-eugenics-victims/2015/02/27/b2b7b0ec-be9e-11e4-bdfa-b8e8f594e6ee_story.html [https://perma.cc/6KX5-A76A].

were alive as of February 1, 2015.[493] Similar to the North Carolina experience, the legislation attracted broad support from conservatives and liberals alike, offering a rare moment of bipartisan consensus.[494] However, the Virginia statute only provides the victims of involuntary sterilizations with a lump sum of only $25,000, as opposed to $50,000.[495]

Additional efforts at the federal and state level continue to promote compensation for the victims of state-sponsored sterilization programs. The enactment of these two reparations programs has led to an outpouring of support for reparations programs within other states.[496] In Congress, there has been a rare bipartisan effort to ensure that payments from current or future state eugenics compensation programs are not considered in eligibility determinations for federal benefits.[497] If enacted, the federal legislation could help facilitate the payment of state reparations payments without limiting the recipient's ability to qualify for federal aid programs.[498] While these developments bode well for the future of legislative reparations in other states, time is quickly running out for many of the victims of involuntary sterilizations across the country.[499]

493. 2015 Appropriations Act, ch. 665, § 1-93, item 307(T)(1), 2015 Va. Acts __, __, (2015).

494. *See* Portnoy, *supra* note 492.

495. 2015 Appropriations Act, ch. 665, § 1-93, item 307(T)(4), 2015 Va. Acts __, __, (2015).

496. *See, e.g.*, Mark G. Bold, Editorial, *It's Time for California to Compensate Its Forced-Sterilization Victims*, L.A. TIMES (Mar. 5, 2015, 8:40 PM), http://www.latimes.com/opinion/op-ed/la-oe-0306-bold-forced-sterilization-compensation-20150306-story.html [https://perma.cc/T283-84A9]; Paul A. Lombardo & Peter L. Hardin, Editorial, *Compensate Eugenic Sterilization Victims: Column,* USA TODAY (Aug. 21, 2013, 6:03 AM), http://www.usatoday.com/story/opinion/2013/08/21/eugenics-north-carolina-column/2662317/ [https://perma.cc/D6BH-GBRC].

497. *See* Mark Barrett, *Tillis, McHenry File Bills to Help Eugenics Victims*, USA TODAY (July 16, 2015, 2:44 PM), http://www.usatoday.com/story/elections/2015/07/16/thom-tillis-patrick-mchenry-eugenics-north-carolina/30247131/ [https://perma.cc/TB2D-5EJ4].

498. The bipartisan legislation, known as the "Treatment of Certain Payments in Eugenics Compensation Act," provides that "[n]otwithstanding any other provision of law, payments made under a State eugenics compensation program shall not be considered as income or resources in determining eligibility for, or the amount of, any Federal public benefit." S. 1698, 114th Cong. § 2(a) (2015) (as passed by the Senate, Nov. 30, 2015). H.R. 2949, a companion bill to S. 1698, was included in a larger bill, H.R. 5210, and recently passed the House on a voice vote. H.R. 5210, 114th Cong. § 5 (2d Sess. 2016); Press Release, U.S. Congressman Patrick McHenry, McHenry Eugenics Compensation Legislation Passes House (July 6, 2016), http://mchenry.house.gov/news/documentsingle.aspx?DocumentID=398250#sthash.YJoASFTV.dpuf [https://perma.cc/ER6E-HLWP]. The legislation has now been referred to the Senate Finance Committee. H.R. 5210, 114th Cong. (2d Sess. 2016).

499. Hoban, *supra* note 452.

C. Designing Future Eugenics Reparations

In considering reparations legislation elsewhere, states may look to a number of factors in designing their programs. Understanding how the state's program functioned is of critical importance. In North Carolina, pivotal questions remain about who was selected for sterilization; how the administrative agency—the state Eugenics Board—operated; and what was the demographic data of those who were sterilized. Judging from the Eugenics Board Meeting minutes,[500] the hearings were perfunctory and often no family members challenged the petition for sterilization. And rather hauntingly—though understandably—there were well-established administrative procedures for sterilizations, including pre-printed sterilization petitions for state officials to complete.[501]

Closely related are difficult questions related to the amount of coercion (or conversely, consent—if any) involved in the sterilizations. As the North Carolina Sterilization Task Force's final report acknowledges, there were varying levels of coercion involved in North Carolina's history.[502] For many people the sterilization was involuntary; for others there was coercion; and for some (perhaps as many as twenty percent during the 1960s) the process was "voluntary."[503] Apparently many women, especially in the 1960s, sought state-supplied sterilization as a method of family planning. How many of those ostensibly "voluntary" requests were coerced in some way, or suggested to those requesting them by government officials, or family members, is unclear.[504] That information may never be known. Undoubtedly, some of this state action resulted in some of the most outrageous interferences with personal autonomy practiced in the United States in the twentieth century.

Each state will struggle with the question of what the compensation program ought to look like. What program would in some measure be fair to people whose personal autonomy was so deeply affected, so long ago? Obviously no amount of money can compensate for some harms. Reparations programs necessarily

500. Eugenics Bd., Minutes of the October 25, 1950 Meeting 1–4 (Oct. 25, 1950), http://www.sterilizationvictims.nc.gov/documents/DCR_Presentation_Handout_B-Sample_Eugenics_Board_Minutes-October1950.pdf [https://perma.cc/59GT-JW6D] (containing single-sentence explanations for decisions regarding sterilization).

501. BROWN, PURPOSE, STATUTORY PROVISIONS, FORMS, AND PROCEDURE, *supra* note 43, at 22–24; BROWN, A BRIEF SURVEY OF THE GROWTH OF EUGENICAL STERILIZATION, *supra* note 43, at 28–30.

502. GOVERNOR'S TASK FORCE, FINAL REPORT, *supra* note 26, at 5.

503. SCHOEN, *supra* note 14, at 113.

504. *Id.* (using the term "elective sterilization" to refer to a "voluntary sterilization").

require legislators to balance limited state funds against the desire to meaningfully repair and assist those who were unjustifiably harmed by the state in a very direct and continuing way. A common approach has been to provide money only in those cases where there remains a direct, living connection—only to those immediate victims who are still alive.[505] Moreover, practical considerations favor calculating a single figure and giving that to every living victim, rather than trying to calibrate harm between victims. The most prominent case of this is the Civil Liberties Act of 1988, which provided $20,000 to every Japanese American interned during World War II who survived until 1988.[506] This approach had some obvious and unfortunate consequences, in that many people who had suffered internment—and whose descendants had suffered from property loss—received nothing.

Other states now have the opportunity to provide similar compensation regimes. They will likely focus on still-living people and seek evidence of coercion. Those two principles will limit—perhaps too much—the class of claimants. For while the living connection has been critical to the North Carolina sterilization compensation regime—and to other reparations regimes, such as the compensation to Japanese Americans interned during World War II[507]—the requirement of survivorship acts as a barrier to recovery for those whose fundamental rights were infringed upon by the state. Moreover, the amount of coercion is difficult to prove so many years later. Given how much effort the state spent to facilitate "consent," as well as the limited efforts the state made to protect those being sterilized, it is reasonable to presume that victims and their families were coerced. At any rate, any ambiguities should be at least resolved in favor of those who were sterilized.

There is something else that did not appear in the North Carolina act, but that would be very useful and positive: a comprehensive study of just what happened. Many outstanding questions regarding the administration of the sterilization program can only be answered, if at all, by looking at records that are within the Eugenics Board's archives. Those records are kept hidden for the legitimate privacy concerns of family members and the sterilization

505. *See, e.g.*, Civil Liberties Act of 1988, 50 U.S.C. §§ 4215(a)(1), 4218(2) (2012); *see also* Alfred L. Brophy, *Reconsidering Reparations*, 81 IND. L.J. 811, 814–15 (2006).

506. Civil Liberties Act of 1988, 50 U.S.C. § 4215(a) (2012); *see also* Alfred L. Brophy, *Reconsidering Reparations*, 81 IND. L.J. 811, 814 (2006).

507. *See* BROPHY, *supra* note 468, at 44 (noting that only those who were interned during World War II and survived until 1986 were eligible for compensation).

victims themselves. Nevertheless, a state legislature can order and fund a study of those records, so that in addition to compensating the victims we can all know the full measure of what happened. Such a study would help us understand how appeals to white supremacy and "cost-benefit" analyses led to legislature-mandated, judiciary-approved, and administratively routinized eugenics programs across our nation in the twentieth century. We remain skeptical that such a study would take place given its potential to threaten the integrity of the state's claim that it has settled and made amends for its decades-long intrusion on personal autonomy in the name of the economic efficiency.

What, then, should future legislative action designed to repair for state-sponsored eugenics look like? We believe that legislatures should establish fixed amounts for each individual who was sterilized pursuant to state-sponsored eugenics programs. Those who sought out sterilization as part of family planning could be excluded from compensation, but there should at least be a rebuttable presumption that individuals sterilized pursuant to the requests of state (or local government officials) are eligible for compensation. Given the extensive and disturbing history of government-encouraged sterilization, the burden should be firmly on government actors to show that sterilization was voluntary rather than coercive.

There are two particularly difficult questions about designing reparations plans for other states that have emerged from North Carolina's experience. First, there is a question about people who were sterilized outside of the actions of state actors. That is, there seem to be instances of women who were sterilized outside of the Eugenics Board *and* outside of the county authorities.[508] This is an issue of local physicians acting independently. Even determining the number of cases like this is difficult, but some anecdotal evidence suggests they happened.[509] One might reasonably argue that the state should pay for those cases on the theory that the state authorities helped establish the environment in which this could happen.[510] Such an approach would expand the scope of compensation beyond the boundary of "state action," but would be consistent with full repair

508. Eric Mennel, *Payments Start for N.C. Victims, But Many Won't Qualify*, NPR (Oct. 31, 2014, 5:04 PM), http://www.npr.org/sections/health-shots/2014/10/31/360355784/payments-start-for-n-c-eugenics-victims-but-many-wont-qualify [https://perma.cc/2X4J-C8NQ].

509. *Id.*

510. *See, e.g.*, Act of Apr. 5, 1933, ch. 224, sec. 11, 1933 N.C. Sess. Laws 345, 349–50 (explicitly providing for individuals to have their own physicians perform sterilization).

for the legal and political environment that told disabled individuals their welfare was less important than the public treasury.

The second difficult issue that has emerged from North Carolina's experience is the question of whether compensation should be limited to those who are still alive. That living connection was a key limiting principle for the North Carolina legislation—and likely made it possible to pass laws that otherwise might have had thousands of claimants.[511] However, that limiting principle also serves to dramatically reduce the reparative scope of the program. There is good reason to expand the program at least to immediate relatives of those who were sterilized, such as surviving spouses and children. Such an expansion would keep many of the values inherent in requiring a living survivor because there are people quite closely connected to the sterilized individual. It is likely those people suffered some of—and in the case of surviving spouses the exact same—the emotional pain as sterilized individual.

What remains to be done, in addition to compensation, is to recover a full story of just how the sterilization programs operated, as state legislatures struggle to assess and repair for some of the most egregious interferences with personal autonomy in the twentieth-century United States. This is a particularly difficult issue because the legacy of eugenics casts a shadow over contemporary discussions of reproductive freedom. Unsurprisingly, many in the African American community in particular find the legacy of state-sponsored sterilization a disturbing warning about the potential for state control of reproductive rights.[512] Thus, redress for the era of eugenics may be necessary not just as a case of doing justice to individuals sterilized, but also to regain legitimacy for the state going forward as it deals with issues of reproductive freedom, particularly for women from historically marginalized communities. In order to restore the confidence and security among North Carolina women that their reproductive rights will be protected in the future, the state must demonstrate that it recognizes the past intrusions on reproductive freedom were wrong and is committed to repairing the damage.[513]

511. *See* Carmon, *supra* note 491.

512. *See, e.g.*, SCHOEN, *supra* note 14, at 70 (discussing skepticism in the African American community about state-sponsored family planning).

513. *See id.* at 249–50.

CONCLUSION

We have placed the North Carolina Eugenics program in the context of the national movement for eugenics that grew in the early twentieth century. The national movement emerged from a set of factors, including the desire to respond to the cost of government care for disabled individuals, a concern for public money over personal autonomy, and a fear of the loss of white supremacy. Though the movement initially faced opposition in the state courts, after the United States Supreme Court's 1927 opinion in *Buck v. Bell*, state courts and legislatures increasingly approved eugenics programs. The North Carolina legislature established a Eugenics Board in 1933 to approve state-provided sterilizations and the Board established an elaborate administrative apparatus to process petitions from state officials seeking permission to sterilize disable institutionalized individuals, as well as North Carolinians living in the community. This regime resulted in the sterilization of approximately 7,600 people.[514] While most frequently the Board processed applications where the individuals or their family members had "consented" to sterilization, in a relatively small percentage of cases from the 1930s to the middle of the 1950s, the Board approved sterilization even over the objections of individuals and their families.

The attention that scholars and journalists brought to the legacy of state-sponsored sterilization led to legislation providing compensation to those who were still-living as of 2013 and could demonstrate that they were sterilized pursuant to action by the state Eugenic Board. While the legislation has been criticized by some survivors who were sterilized without the authorization of the Eugenics Board, it has already provided a model for other states seeking to redress their own legacies of eugenics. North Carolina, which was once a leading jurisdiction for sterilization, is now once again leading the way; this time, in addressing what to do about that shameful legacy.

514. GOVERNOR'S TASK FORCE, FINAL REPORT, *supra* note 26, at 1, 5.

APPENDIX

A. Table 1: Percentage of Sterilized North Carolinians in Institutions, 1930–1966[515]

Year	Institutionalized	Non-Institutionalized	Institutionalized (%)
1930	9	5	64%
1931	3	4	43%
1932	15	3	83%
1933	2	2	50%
1934	45	15	75%
1935	82	85	49%
1936	56	37	60%
1937	82	42	66%
1938	152	48	76%
1939	70	59	54%
1940	94	59	61%
1941	103	73	59%
1942	98	43	70%
1943	107	41	72%
1944	63	39	62%
1945	74	42	64%
1946	47	57	45%
1947	65	69	49%
1948	92	96	49%
1949	109	135	45%
1950	187	111	63%
1951	255	112	69%
1952	213	134	61%
1953	115	168	41%
1954	128	170	43%
1955	127	165	43%
1956	70	147	32%
1957	81	224	27%

515. 1966 BIENNIAL REPORT, *supra* note 362, at 27–28.

Year	Institutionalized	Non-Institutionalized	Institutionalized (%)
1958	75	243	24%
1959	45	215	17%
1960	49	185	21%
1961	34	214	14%
1962	37	193	16%
1963	36	204	15%
1964	49	207	19%
1965	26	141	16%
1966	7	70	9%

B. Table 2: Percentage of Petitions Presented Without Consent of Individual Family Member in Biennial Periods, 1934–1966[516]

Years	Total Petitions Presented	Petitions Granted	Petitions Without Consent	Involuntary Petitions (%)
1934–1936	309	301	54	17.5
1936–1938	356	350	20	5.6
1938–1940	352	345	23	6.5
1940–1942	390	385	12	3.1
1942–1944	328	309	11	3.4
1944–1946	282	276	10	3.5
1946–1948	337	330	16	4.8
1948–1950	562	543	21	3.7
1950–1952	743	796	25	3.4
1952–1954	673	650	30	4.5
1954–1956	657	634	–[†]	–[†]
1956–1958	674	658	–[†]	–[†]
1958–1960	576	564	–[†]	–[†]
1960–1962	558	531	–[†]	–[†]
1962–1964	591	545	–[†]	–[†]
1964–1966	461	368	–[†]	–[†]

516. *See generally* EUGENICS BD. OF N.C., 1–16 BIENNIAL REPORT (1936–1966) (providing the underlying aggregate data on the petitions presented before the Eugenics Board).

[†] Number of petitions without consent were not reported after the 1952–1954 biennial report. *See generally* EUGENICS BD. OF N.C., 9–16 BIENNIAL REPORT (1954–1966) (providing the underlying aggregate data on sterilizations in North Carolina during this period).

C. Table 3: Percentage of Petitions for Sterilization Authorized by North Carolina Eugenics Board in Biennial Periods, 1934–1965[517]

Years	Total Petitions Presented	Petitions Granted	Authorized Petitions (%)
1934–1936	309	301	97%
1936–1938	356	350	99%
1938–1940	352	345	98%
1940–1942	390	385	99%
1942–1944	328	309	94%
1944–1946	282	276	98%
1946–1948	337	330	98%
1948–1950	562	543	97%
1950–1952	743	796	107%[†]
1952–1954	673	650	97%
1954–1956	657	634	96%
1956–1958	674	658	98%
1958–1960	576	564	98%
1960–1962	558	531	95%
1962–1964	591	545	92%
1964–1966	461	368	80%

517. 1966 BIENNIAL REPORT: *supra* note 362, at 25. The data are reported from July of the first year through June of the concluding year. *See id.*

[†] The 1950–1951 numbers seem to reflect petitions from an earlier period that were acted on in the 1950–1951 period, when the Eugenics Board was aggressively pursuing its missions. *See* 1952 BIENNIAL REPORT, *supra* note 395, at 8–10.

D. Table 4: Sterilization by Gender, 1929–1966[518]

Year	Total	Men	Women	Women as Total %
1929	3	2	1	33.3%
1930	17	2	15	88.2%
1931	11	0	11	100%
1932	18	9	9	50%
1933	4	1	3	75%
1934	23	15	8	34.8%
1935	178	24	154	86.5%
1936	98	12	86	87.8%
1937	128	21	107	83.6%
1938	202	56	146	72.3%
1939	138	36	102	73.9%
1940	159	47	112	70.4%
1941	181	49	132	72.9%
1942	148	36	112	75.7%
1943	152	33	119	78.3%
1944	105	18	87	82.9%
1945	117	18	99	84.6%
1946	106	16	90	84.9%
1947	140	26	114	81.4%
1948	189	34	155	82.0%
1949	249	31	218	87.6%
1950	300	60	240	80%
1951	372	106	266	71.5%
1952	348	106	266	76.4%
1953	283	40	243	85.9%
1954	298	45	253	84.9%
1955	292	75	217	74.3%
1956	217	43	174	80.2%

518. 1966 BIENNIAL REPORT, *supra* note 392, at 26. Data for 1944 were corrected using 1944–1946 Biennial Report. *See* R. EUGENE BROWN, EUGENICS BD. OF N.C., 6 BIENNIAL REPORT: JULY 1, 1944 TO JUNE 30, 1946, at 11 (1946), https://ia600201.us.archive.org/30/items/biennialreporteug06nort/biennialreporteug06nort.pdf [https://perma.cc/GUU6-NWTJ].

Year	Total	Men	Women	Women as Total %
1957	305	52	253	83.0%
1958	318	29	289	90.9%
1959	260	22	238	91.5%
1960	234	9	225	96.2%
1961	248	8	240	96.8%
1962	230	8	222	96.5%
1963	240	7	233	97.1%
1964	256	2	254	99.2%
1965	167	3	164	98.2%
1966	77	2	75	97.4%

E. Table 5: Sterilizations by Race in Biennial Periods, 1946–1966[519]

Years	Operations Performed	White	Black	Native American	% Black
1946–1948	291	238	53	0	18.2%
1948–1950	468	366	100	2	21.4%
1950–1952	704	531	171	2	24.3%
1952–1954	626	423	202	1	32.3%
1954–1956	556	357	198	1	35.6%
1956–1958	562	284	274	4	48.8%
1958–1960	534	209	315	11	59.0%
1960–1962	467	179	284	4	60.8%
1962–1964	507	150	323	14	63.7%
1964–1966	356	124	228	4	64.0%

519. *See generally* EUGENICS BD. OF N.C., 7–16 BIENNIAL REPORT (1946–1966) (providing the underlying aggregate data on sterilizations by race).